No. 11286

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California Corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California Corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellees.

APPELLANT BRUCKMAN'S OPENING BRIEF.

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TOPICAL INDEX.

PAGE

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Statutes.

Textbooks.

SUMMARY OF ARGUMENT.

PAGE

A.

PAGE

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Jurisdiction.

Jurisdiction to review the judgment of the court below is conferred by Title 28, Section 225, of the United States Code.

The final judgment of the District Court from which the appeal was taken was entered January 8, 1946. [Tr. p. 43.]

Notice of appeal by defendants was served and filed in the District Court February 6, 1946. [Tr. p. 44.]

Notice of cross-appeal by plaintiff was served and filed February 21, 1946. [Tr. p. 48.]

The District Court had jurisdiction by reason of Section 34 of the Copyright Act (Title 17, Section 34, U. S. C. A.)

Statement of the Case.

Nature of Case.

This action was brought under Section 25 of the Copyright Act to recover actual and in lieu damages and attorney fees, and to obtain an accounting of profits and an injunction by reason of a claimed violation of subdivision (d) of Section 1 of the Copyright Act, consisting of the distribution for exhibition and the exhibition of a photoplay which contained a comedy routine suggested by and patterned after a like routine found in an earlier copyrighted photoplay owned by plaintiff.

The trial court denied in lieu damages and an accounting of profits, but gave judgment for plaintiff in the sum of $40,000.00 actual damages and $10,000.00 attorney fees, and granted injunctive relief. [Tr. pp. 42-43.]

The case is before this court on an appeal taken by defendants, and a cross-appeal taken by plaintiff. [Tr. pp. 44, 48.]

Appellants and cross-appellees, Universal Pictures Company, Inc., and Clyde Bruckman, were defendants in the court below. Appellee and cross-appellant, Harold Lloyd Corporation, was plaintiff in the court below. The parties are sometimes referred to by their designations in the court below.

The errors relied on by defendant Bruckman arise out of the trial court's failure to dismiss the action because plaintiff did not produce evidence showing either liability or damage, particularly as to defendant Bruckman.

The Copyright Act.

The "writings" for which copyright may be secured is determined by Section 4 of the Act of 1909, limited by the provisions of Article I, Section 8, of the Constitution. Section 1 of the Act gives distinct and specific monopolies to enumerated copyrighted works, each of which rests on an express clause in the section. Subdivision (a) of Section 1 gives a monopoly of "copy rights," that is the right to multiple copies and sell published works, including books, and photographs. Subdivision (b) of Section 1 gives a monopoly of the right to "make any other version" of the copyrighted work "if it be a literary work." Subdivision (d) of Section 1 gives a monopoly of "play rights" or "stage rights," that is the right "to perform or represent the copyrighted work publicly if it be a drama." Section 5 classifies copyrighted works for the purpose of applications for copyright and the guidance of the Copyright Office. By the amendment of 1912 "(l) Motion-picture photoplays; (m) Motion pictures other than photoplays" are added to the works classified in Section 5. By Section 9, copyright of published works is "secured" by publication and prescribed notice. Section 11 provides for the copyright of works "of which copies are not reproduced for sale." The amendments of 1912 to Section 11 provides for filing "of a title and description, with one print taken from each scene or act, if the work be a motion picture photoplay."

The pertinent provisions of the Copyright Act of 1909 as amended in 1912, the pertinent Rules of the Copyright Office, and a memorandum on the background and legislative history of the Act of 1909 and the 1912 amendments are given in the Appendix.

The Pleadings.

The complaint, filed April 4, 1945, alleged that plaintiff had "produced" * * * an original motion picture photoplay starring Harold Lloyd and entitled 'Movie Crazy'," which constituted copyrightable subject matter, and had obtained a copyright on the same on September 15, 1932, and that during the year 1944 "defendants and each of them infringed upon plaintiff's said copyright by producing and commencing distribution, release and exhibition to the general public * * * of a motion picture photoplay entitled 'So's Your Uncle' which is largely copied from and based upon plaintiff's said copyrighted motion picture photoplay entitled 'Movie Crazy'."

The complaint also alleged that by reason of the infringements plaintiff had been damaged "generally in the sum of $200,000.00"; and specially in the sum of $200,000.00 by the destruction of the rights to "re-issue, reproduce and remake" "Movie Crazy"; also, that on March 20, 1945, plaintiff notified defendants to "cease and desist further distribution, exhibition or lease of defendant's said motion picture photoplay entitled 'So's Your Uncle' but * * * defendants have continued to infringe upon plaintiff's said copyright by continuing to release, distribute and exhibit said motion picture to the public"; and also, "defendants have secured for themselves and will secure for themselves in the future benefits, privileges and profits."

The complaint prayed for $200,000.00 in general damages, $200,000.00 in special damages, an accounting of profits, injunctive relief, and attorney fees in the sum of $40,000.00. [Tr. pp. 2-7.]

Defendants filed separate motions for a bill of particulars, in which they asked, among other things, for an order requiring plaintiff to state: "(d) The specific literary material, incidents, episodes, sequences, dialogues, similarities, and publicity values used or embodied in the motion picture photoplay entitled 'So's Your Uncle' and claimed by plaintiff to be copied from or based upon, or largely copied from or based upon, the motion picture photoplay entitled 'Movie Crazy'." [Tr. pp. 8-10; 11-13.]

The motions for a bill of particulars were denied. [Tr. p. 16.]

Defendants filed separate answers in which they denied that plaintiff's motion picture photoplay entitled "Movie Crazy" was an original motion picture photoplay or constituted copyrightable subject matter; denied that they, or either of them, infringed upon plaintiff's copyright; denied that defendant Bruckman had produced, or commenced distribution or release or exhibition of, the photoplay entitled "So's Your Uncle"; denied that plaintiff had been damaged at all; and denied that plaintiff had notified defendant Bruckman to cease and desist further distribution, exhibition, or release of "So's Your Uncle," or that defendant Bruckman had continued to release, distribute, and exhibit "So's Your Uncle."

By way of special defense, both answers set up that the complaint "does not state a claim upon which relief can be granted." [Bruckman's Answer, Tr. pp. 22-26; Universal's Answer, Tr. pp. 17-21.]

Departures From Allegations.

Plaintiff did not undertake to prove its allegation that "So's Your Uncle" "is largely copied from and based upon" "Movie Crazy."

Plaintiff also made no effort to prove that Bruckman had anything to do with the production, distribution, release, or exhibition of "So's Your Uncle."

The Findings.

The Findings follow the complaint, except in the following particulars:

1. It is found that defendants "were fully informed and had full knowledge that that certain sequence * * * constituting the so-called 'magician's coat sequence' * * * was copied and misappropriated by defendants and each of them in that said motion picture photoplay entitled 'So's Your Uncle' from plaintiff's motion picture photoplay entitled 'Movie Crazy'" and that "the characters, characterization, motivation, treatment, action and sequence of action" with regard to the sequence in "So's Your Uncle" "were knowingly, wilfully and deliberately copied, misappropriated, and plagiarized by defendants." [Tr. pp. 34-35.]

2. It is found that defendant Bruckman "was employed by the defendant Universal Pictures Co. Inc. in the capacity of writer and to assist in the writing of a certain motion picture photoplay entitled 'So's Your Uncle'," and that defendant Universal Pictures Co., Inc., alone "produced, distributed, released and exhibited to the general public * * * said motion picture photoplay

entitled 'So's Your Uncle' in violation of plaintiff's exclusive rights in and to its copyright upon said motion picture 'Movie Crazy' "; also, that notice of infringement had been given by plaintiff only to defendant Universal Pictures Company, Inc., and that defendant alone threatened to continue to distribute, release, and exhibit "So's Your Uncle." [Tr. pp. 34-35.]

3. It is found that "plaintiff's rights to re-issue [*i. e.,* reprint from the old negatives, (Tr. p. 36)], and remake [*i. e.,* make a new version of, (Tr. p. 36)], said motion picture photoplay entitled 'Movie Crazy' were substantially damaged and impaired by reason of said infringing acts of defendants." [Tr. p. 36.]

4. It is found that "by reason of said infringements by defendants and each of them upon plaintiff's copyright, * * * plaintiff has been damaged by defendants and each of them in the sum of $40,000.00." [Tr. p. 35.]

5. It is found that "the total amount of profits realized and derived by defendant Universal Pictures Co. Inc. from the production and distribution of said motion picture photoplay entitled 'So's Your Uncle' exceeds $20,500.00 but the profits which said defendant Universal Pictures Co. Inc., has received and derived from said infringements upon plaintiff's said copyright is 20% of said profits and no more, to-wit: the sum of $4,100.00." [Tr. p. 36.]

6. It is found that "a reasonable attorney's fee to be awarded to the plaintiff is the sum of $10,000.00." [Tr. p. 37.]

The Record.

The record is made up not only of the printed transcript on appeal but also of original exhibits certified to this court, particularly plaintiff's copyrighted photoplay "Movie Crazy" [Pltf. Ex. 4]; the photoplay "So's Your Uncle," produced by defendant Universal Pictures, Inc., in 1943, and distributed in 1944 and 1945 [Defts. Ex. D]; the cutting continuity of "So's Your Uncle" [Pltf. Ex. 3]; the photoplay "Loco Boy Makes Good" produced by Columbia Pictures in 1941 and distributed in 1941-1943 [Defts. Ex. H]; and printed copy of the stage play "Merton of the Movies," consisting of 112 pages, copyrighted in 1922. [Defts. Ex. A.]

There is no substantial conflict in the evidence, indeed little conflict of any kind, except in the opinion evidence as to the damages all of which the court rejected in assessing damages. "Movie Crazy" is a full length Class A picture, which lasts for 65 minutes and 40 seconds. [Tr. p. 384.] "So's Your Uncle" is a Class B picture, shown as a secondary film in double feature houses. It lasts 63 minutes and 21 seconds. [Tr. p. 385.] "Movie Crazy" and "So's Your Uncle" have no points of similarity except with respect to the comedy routines in both pictures, referred to by the court in its findings as "the magician's coat sequence." The comedy routine in "Movie Crazy" consists of a comedian getting into a magician's coat by mistake, and while in the coat performing certain gags and stage business usually associated with magicians. The comedy routine takes 11 minutes and 14 seconds in "Movie Crazy" and only 6 minutes and 1 second in "So's Your Uncle." While the comedy routine in "So's Your Uncle" is similar to the comedy routine in "Movie Crazy"

in some respects, it is dissimilar in other respects. Admittedly, the comedy routine in "So's Your Uncle" was suggested by and patterned after the routine in "Movie Crazy."

The questions presented by the record are: were the defendants, Universal Pictures Company, Inc., and Bruckman, particularly Bruckman, within their rights in borrowing what they did from plaintiff's comedy routine? If they were not, did any damage result from the acts of defendants, particularly from the acts of defendant Bruckman? If so, how much?

Plaintiff's Comedy Routine.

The magician's coat routine is introduced into "Movie Crazy" by having Harold (portrayed by Harold Lloyd), a simple lad ambitious for a career in pictures, gain admission to a swank dinner dance given by Mrs. Kitterman, a movie magnate's wife, through the device of an invitation he gained possession of by mistake. After gaining admission, Harold goes into the men's washroom and hangs his coat up while washing. His coat falls down, and the magician's coat is hung on the hook from which Harold's coat has fallen. After washing, Harold gets into the magician's coat by mistake, and returns to the dining room. His invitation calls for a seat at the table of the hostess. He is shown to the table. He is introduced to the hostess. He asks her to dance. He also dances with a vamp. In the course of the dances, a woman purloins silverware by putting it under her garter, and handkerchiefs, elastics, an egg, a rabbit, birds and mice come out of the magician's coat. The handkerchief trick is played on Mrs. Kitterman. The rabbit and the egg are served by the waiter to a "drunk," to the latter's dis-

comfiture. Birds alight on the hostess and other ladies, and mice run down the back of the hostess and other ladies, to their embarrassment. Water from Harold's boutonnaire is squirted at Mrs. Kitterman and another lady, with the result that Harold's face is slapped by the hostess and a glass of water is thrown at the wrong man by the hostess. Finally, a whole army of mice comes out of the magician's coat, to the embarrassment of most of the ladies present. In the resulting melee the magician comes in and reproaches Harold for stealing his coat. Harold's credentials are examined, and he is found to be an imposter and is literally thrown out. [Pltf. Ex. 4, Reels 7, 8.]

Harold Lloyd (who seems to be an *alter ego* of plaintiff) referred to the incidents in the scene as "stage business" and "gags." [Tr. pp. 136, 137.]

Plaintiff's Photoplay.

"Movie Crazy" is built around an unsophisticated country boy who is ambitious to get a motion picture contract, and finally succeeds as the result of a series of disconnected blunders.

Harold writes from his Kansas home to the Planet Film Company in Hollywood, enclosing, by mistake, a photograph of a handsome actor as his own. O'Brien, executive of the Film Company, answers the letter, saying "Very impressed with the picture you sent. If you come to Hollywood I will be glad to give you a test." Harold immediately leaves for Hollywood. In arriving in Los Angeles at the old Santa Fe Depot, by mistake he walks through a set where scenes in a motion picture are being photographed. Vance, an actor, who turns out to

be the villain of the picture, holds Harold up to ridicule. Harold catches a rose thrown by Mary, the heroine of the picture being photographed, who is in Spanish costume and wearing a black wig, mistakenly thinking that the rose is being thrown to him. Harold goes to the studio for a test. He makes many blunders and indulges in much slapstick. He finally gets the test, which is a failure. Harold, however, thinks it is a success. Harold meets Mary out of makeup. He does not recognize her, as she is a blond in real life. She does not know him. More slapstick ensues, including a motor policeman chasing Mary's car with Harold on the running board, the loss of one of Harold's shoes in the gutter, and the changing of clothes by Harold in Mary's apartment. There are numerous scenes in which Harold is made ridiculous, with Mary acting both in her true character and as a Spanish heroine unknown to Harold. Harold calls at Mary's apartment from time to time, mistakenly thinking she has a romantic interest in him. Mary finally sends Harold a note on the back of an engraved invitation to a dinner dance to be given at the Falcon Hotel by Mrs. Kitterman, the wife of the president of the Planet Film Company. Harold reads the invitation but does not see the note. He goes to the dinner dance, thinking he has been invited. He goes to the washroom, and hangs up his coat while washing. By mistake he puts on a magician's coat which is hanging next to his own. The magician's coat comedy routine then takes place. While Harold is sprawled on the steps after being thrown out, Mary arrives and expresses sympathy for him. The episode is not reported to Mr. Kitterman or any of the executives of the company. Later, Harold, by mistake, gets into an old-fashioned water scene being

photographed. He seriously fights with Vance, thinking Vance is taking advantage of Mary. The scene is wrecked, but Mr. Kitterman arrives in time to see a part of it. This is his first knowledge that Harold exists. He hires Harold as an actor, knowing of Harold's blundering into the scene, because Harold has made him laugh and has a funny face. [Pltf. Ex. 4.]

The Alleged Infringing Photoplay.

"So's Your Uncle" is the story of a sophisticated and highly intelligent young dramatist, no longer a boy, who requires financing, and in his search for it finds a charming wife for himself and a rich wife for his uncle.

The principal characters are Stephen Curtis, the dramatist; Joe, Steve's friend and associate in producing Steve's play; Patricia, an attractive and charming New York society girl; Roger, Pat's finance; Minerva, Pat's aunt, a wealthy, but vain and gushing, elderly woman; and John Curtis, Steve's uncle, a financial tycoon.

The action takes place in New York.

The play begins in an empty theater, with Steve, Joe, and others rehearsing the first scene in Steve's play before prospective financial backers. The backers walk out before the scene is completed. As they go out, in comes a person looking for Steve, who has been locked out of his hotel and had his clothes impounded because he was three months in arrears on his rent. Steve naturally thinks the person looking for him is a creditor. By a clever ruse, Steve escapes in his makeup based on a picture of his uncle. On crossing the street, he is run down by Pat, who is with Roger. Steve is not hurt, but he

simulates injury when he hears Pat telling Roger they should take him to the home of Aunt Minerva, with whom Pat resides. Steve does this to get a night's lodging. The next morning Steve, in the makeup of his uncle, meets Aunt Minerva, who falls in love with him. Steve, in the character of his uncle, tells Minerva about his own play. She becomes interested in it, and asks to have the nephew call. Steve calls in his own character. Pat falls in love with him. The rest of the play is made up of farcial situations, in which Steve plays the parts of himself and his uncle, becomes engaged to Pat in his own character, and to Minerva, in the character of his uncle. He keeps both Pat and Minerva deceived to the end, when his uncle puts in an appearance. The uncle reproves Steve. Steve reveals his predicament to the uncle, and tells him that Minerva is a daughter of a famous oil baron. The uncle agrees with Steve to marry Minerva. Steve and the Uncle marry Pat and Minerva. It finally appears that the person suspected by Steve as a creditor was an agent of the uncle seeking Steve to settle a fortune on him. [Pltf. Ex. 3; Defts. Ex. D.]

Comedy Routine in Alleged Infringing Photoplay.

About the middle of "So's Your Uncle," Steve, in the character of his uncle, and Pat, Minerva, and Roger go to a night club. It is necessary for Steve also to appear in his own character. He enlists the aid of Joe, now a waiter at the night club, to get a change of clothes for him. Steve and Joe are next found in the men's lounge. Steve tries to get Joe to change clothes with him, but instead Joe agrees to find Steve other clothes. Joe goes into the men's dressing room and finds a magician putting

doves, rabbits, and other "props" in his coat pocket, and testing a water pistol. While the magician is out of the room, Joe picks up his coat, which Steve dons not by mistake but by the deliberate act of Joe, without knowing, however, that it is a magician's coat, and returns to the night club in his own character. Steve dances with Pat. A string of handkerchiefs, doves, eggs, chickens, rabbits, and mice come out of Steve's coat in practically the same way and in substantially the same sequence that they come out of the coat of Harold. The handkerchief trick is not done with Pat, with whom he is dancing, but with one of the other guests. Steve squirts water which hits not Pat, with whom he is still dancing, but Mrs. Buffington, a friend of Pat, in the face. People in the audience, and not any of Steve's party, are the butt of the magician's tricks. Steve does not have his face slapped. Pat pays no attention to the tricks. Steve and Pat leave the party, Steve's stock with Pat having gone up. Joe gets all the blame, as the magician finds Joe with the coat after Steve has discarded it. Steve gets out free and with flying colors.

The next day Steve meets Joe at the night club, Joe still being employed as a waiter. Steve tells Joe that he has fallen for Pat, and that he intends to go to work, and that he has killed off his uncle. The conversation is heard. In the belief that there has been a homicide which will bring scandal to the night club, both Joe and Steve are thrown out. [Pltf. Ex. 3; Reel 3, p. 5 to Reel 6, p. 6.]

Similarities.

The only similarities in the two routines are in the gags and stage business, and in the order in which they appear.

Dissimilarities.

"Movie Crazy" is slapstick comedy, while "So's Your Uncle" is true farce.

There is obviously no similarity between the story in "So's Your Uncle" and the story in "Movie Crazy" insofar as it has a story.

The ages, appearances, and costumes of Steve and Harold, and the dialogues are also altogether different.

The characters of Harold and Steve are likewise altogether different.

Besides being an unsophisticated country boy, Harold is stupid and timid, and has a genius for making mistakes which recoil on him to his own embarrassment and the amusement of the bystanders, with resulting sympathy for himself on the part of the audience.

Steve, besides being a sophisticated and highly intelligent man of the world, is not only self-assured, but brash to a degree. He uses bold and cheeky stratagems by which he emerges master of every situation, to the admiration of the audience.

There is no resemblance between the characters in the two routines, other than Harold and Steve.

In "Movie Crazy" there is no character corresponding to Joe in "So's Your Uncle." The characters, other than Harold, are the movie magnate's wife, a movie executive, and movie actors and actresses, including a vamp, who is featured dancing with Harold. In "So's Your Uncle" the characters, other than Steve, are Joe, who is a foil to Steve; Pat, Minerva, and Roger, who are New York society people; friends of Pat and Minerva; and night club entertainers.

The materials are used to altogether different purposes in the two routines.

In "Movie Crazy" the routine is built entirely around the idea of embarrassment to Harold, and resulting sympathy for him. Harold gains admission to the dinner dance, which is a private party, by mistake. He gets into the magician's coat by mistake. He makes his dancing partner the butt of his gags and stage business. He gets his face slapped. He is unmasked by the magician. The mistake as to the invitation is discovered. Harold is literally thrown out. From beginning to end Harold is under a cloud, is embarrassed by the incidents that occur, and is in jeopardy of the greater embarrassment of being thrown out.

In the "So's Your Uncle" routine, Steve goes to the public night club rightfully. Joe gets the magician's coat, knowing it is a magician's coat. Members of Steve's party are not victims of the gags and stage business. Joe gets the blame. Steve emerges triumphant with increased prestige with Pat.

Public Domain.

PLAINTIFF'S COMEDY ROUTINE.

The magician's coat routine in "Movie Crazy" has no theme of its own, and is not an integral part of the story of "Movie Crazy" as a whole, because it neither furthers nor impedes Harold in getting the picture contract.

The materials used in the magician's coat routine in "Movie Crazy," consisting of getting into the magician's coat by mistake and the gags and stage business performed, are commonplace.

It is true that Bruckman testified that, as far as he knew, getting into the magician's coat by mistake was original with Lloyd [Tr. p. 95], but we ask the court to take judicial notice that the idea of changing clothes goes back to Aesop's fable "The Wolf in Sheep's Clothing," and was exploited over and over again in the plays of the Roman poet Plautus. The idea of conjuring in connection with tablecloths, saddlebags, and other articles of personal property, is familiar to readers of "The Arabian Nights." Magic in connection with garments is developed in old books such as Balzac's "The Wild Ass's Skin," and Baum's "Queen Zixi." There are scores of novels, in any public library of any size, built around characters in other persons' clothes.

As to the gags and stage business used in "Movie Crazy."

Bruckman testified that prior to the release of "Movie Crazy" he had seen many magicians on the vaudeville

stage geting all sorts of things out of clothes, including mice, pigeons, eggs, flags, sausages, flower pots, and collapsible props of all natures; also, that long prior to "Movie Crazy" it was common on the vauleville stage for comedians to imitate, or pretend to be, magicians, and perform magicians' acts. [Tr. pp. 233, 234.]

Plaintiff stipulated that there is one magician's act in almost every old-time vauleville series of seven or eight acts, and that the kind of tricks referred to by Bruckman have been done by magicians at night clubs or in other places of amusement. [Tr. p. 234.]

Felix Adler testified relative to the stage business in "Movie Crazy" which involved the squirting of water through the flower in Harold's boutonnaire, and a woman picking up a glass of water and throwing it at the wrong person, that he had seen this water trick long prior to 1932 at the Sennett and old Fox lots [Tr. p. 324]; that with reference to the business with knives and forks in the woman's garter as it appeared in "Movie Crazy," he had seen such business on the stage long prior to 1932 [Tr. pp. 323, 324]; and that referring to the stage business in "Movie Crazy" with reference to the fly on the head of the drunken person, and an egg being dropped into his hand and then being smashed by the drunken person on his head to get rid of the fly, he had seen such stage business prior to 1932, and particularly in a two-reeler Mack Sennett Comedy called "Fat Roebuck" [Tr. p. 323]; and referring to the other stage business in "Movie Crazy," for example a string of handkerchiefs, that it was a standard trick, as also were the rabbits, pigeons, eggs, and mice. [Tr. p. 326.]

W. W. Larsen testified that prior to the release of "Movie Crazy" in 1932, magician's acts had been combined with comedy routines in night clubs and hotels and on the stage, and that many times prior to 1932 acts had been performed in which a person who was not a magician, clad in a magician's coat, performed magicians' tricks and stage business; also, that in connection with these acts, things in the nature of magicians' "props" appeared to come out of the magician's coat accidentally; also, that, ever since he could remember, this had been a favored subject of cartoons, and that such props, including rabbits, doves, billiard balls, flags, cards, and eggs, dropped out of a magician's coat; that this was all prior to 1932, and that in such performances a rabbit had frequently been introduced beneath a serving cover, and that he must have done that act himself for twenty years. [Tr. pp. 311, 312.]

On cross-examination of plaintiff's counsel, Mr. Larsen gave further details:

> "Q. By Mr. Fendler: I am interested in this secretion of the rabbit in the tray. Will you describe what you have done before audiences in secreting rabbits under a cover on a platter? A. Yes, sir. It is not a tray; it is a cover. I do it with either a cover or a hat.
>
> Q. Now, describe what you do. A. This is not in my regular program. This is when I am working at fiestas in hotels.
>
> Q. All right. A. I will go up to a table and with a deck of cards get one party to select out a card. It is placed face down. Then I will either take a cover or a hat and place it over the card. I tell them if they will think of another card, the

card down here will change into the card they think of. I lift it and sometimes that part of the trick works and sometimes it doesn't. Then you close it in an effort to make another attempt, lift again, and there is a rabbit.

Q. Do you usually use a drunk at a table to try that trick with? A. I have performed before lots of drunks.

Q. I mean do you usually try and select a drunk for a trick like that? A. Well, it is fun to work with a drunk." [Tr. pp. 315-316.]

We also ask the court to take judicial notice of the following from the chapter entitled "George Melies: 'Artificially Arranged Scenes'," in *Rise of the American Film,* by Lewis Jacobs, published in 1939:

"* * * By 1900 he had made over two hundred 'magical, mystical and trick films,' each a minute or two long. Imported into the United States, these unique and amazing movies were immediately singled out by the public and became the most popular of all screen entertainments. So popular were they, and so unmatchable, that American manufacturers made copies or 'dupes' and sold them under new names as their own.

Melies' aim in these films was to mystify and startle. His prowess as a magician [he was a professional magician before he turned to making pictures] found curious expression in his earliest efforts: *The Vanishing Lady, The Haunted Castle, The Laboratory of Mephistopheles, A Hypnotist at Work, Cagliostro's Mirror, The Bewitched Inn, Conjurer Making 10 Hats in 60 Seconds.* These films showed people disappearing magically, cut in half,

flying through the air; apparitions taking horrible shapes; animals turning into human beings, and human beings into animals." (P. 23.)

As a matter of fact, plaintiff made no effort to prove more than that the act of Harold in getting into the magician's coat by accident and the "particular combination of gags with the particular sequence of action as finally depicted on the screen of "Movie Crazy" were original. [Tr. pp. 94-95.]

The only witness called was Bruckman, who testified as follows:

"Q. By the Court: Was it old to have somebody get a magician's coat and put it on by mistake? A. No, as far as I know, that was original.

Q. By Mr. Fendler: And the particular combination of gags with the particular sequence of action as finally depicted on the screen of Movie Crazy was original, was it not?

The Court: As far as you know?

A. As far as I know, yes." [Tr. p. 95.]

The only thing in the routine stressed by Lloyd as original was the mistake of Harold getting into the dinner dance.

This appears from the following:

"The Court: I know. But that sequence was brought in when this girl, by mistake, used the other side of an invitation.

The Witness: That is correct.

The Court: So that was cut into the picture through that.

The Witness: That is the way he was brought into the party, yes.

The Court: That was the way that was brought in.

The Witness: That is used because that is a basic comedy idea of a man getting into a place by mistake. *We consider that the more a man is laboring under a misapprehension in getting into some place where he does not belong, that it puts him into a unique comedy situation.*

The Court: Of course, there isn't anything new about that.

The Witness: No, I am not claiming anything new about it. *The new part was that the rebuff was on one side and the invitation was on the other, and he looked at the wrong side. That was the unique part, getting him into the situation."* [Tr. pp. 142-143.] (Italics ours.)

"Movie Crazy" as a Whole.

The incidents in "Movie Crazy" were largely anticipated in "Small Town Idol," "Extra Girl," and "Merton of the Movies."

In "Small Town Idol," a feature length picture done by Mack Sennett prior to 1928, the story was that of "a country bumpkin trying to crash Hollywood and becoming a success in pictures." [Tr. p. 326.]

"Extra Girl" is also a full length feature picture made by Mack Sennett prior to 1928, where "a person gets a screen test by sending the wrong photograph to the studio." [Tr. p. 327.]

In both "Merton of the Movies" (which was copyrighted and produced in 1922) and "Movie Crazy" the boy hero is from a small town. Each fondles photographs and pretends play acting. Each sends a photograph of someone else to Hollywood. Each says he wishes to play at a certain studio because a certain actress is there. Each one is tried out in a small part and fails. In his part, Merton is required to walk over to a table and discover a book, and in his part Harold is required to walk from the truck to a newsstand. Each is given a test, and each thinks it is a success, but later is informed it was a failure. Each has a funny face. Each is given a contract because it is discovered accidently that he can make people laugh. Each one falls in love with a girl who has befriended him because she felt sorry for him. In "Merton of the Movies" the girl calls herself "Mother" to Merton, and in "Movie Crazy" the girl calls herself "Grandmother" to Harold. [Defs. Ex. A and Pltf. Ex. 4.]

At the time "Movie Crazy" was in preparation, Bruckman and John Gray, another writer working with Lloyd on the picture, felt there was considerable similarity between "Merton of the Movies" and "Movie Crazy." Gray accordingly offered a suggestion for an opening of the picture, showing Harold reading a copy of "Merton of the Movies," closing the book, placing it down, and turning to his father and saying "If Merton could do it, so can I." This suggestion was made to Lloyd, but Lloyd dismissed it. [Tr. pp. 231-232.]

"Movie Crazy" is really little more than a burlesque version of "Merton of the Movies." The characters are all stock figures. There is no theme or thread of story

except as tied up with a disconnected series of gags and stage business making up the comedy routines.

In "Movie Crazy" the principal gags and stage business, other than the magician's coat sequence, relate to the breaking of glass, losing a shoe, and a water fight.

The breaking of glass and shoe items were taken from earlier pictures. [Tr. pp. 239-241.]

As to the water fight, which is the longest comedy sequence and the most important from the standpoint of the story because it resulted in a contract for Harold, we ask the court to take judicial notice of the following quoted from *How Motion Pictures Are Made,* by Homer Croy, published in 1918:

> "While the pie was being made to answer comedy purpose in various disguises, it was found that a character falling into water was also a source of amusement to audiences. The water motif appeared in film after film, month after month, even year after year, until finally it was suspected that audiences were no longer aroused risibly beyond their control by the pushing of one comedian into a river or lake by another. Different expediences were tried, and by a careful checking up of the responses of audiences it was found to a calculable certainty what film situations could be relied on to inspire approval. A list of situations that could be depended on for a laugh was in the mind of every director, who employed them at his discretion. The list included:
>
> The hitting of an opponent with a pie.
>
> Falling into water.
>
> A kick; a blow.
>
> A waiter falling down-stairs with a tray of dishes.

Unexpected disaster, such as falling into a manhole.

Stepping on a lady's train.

Assuming of a woman's clothes." [pp. 217-218.]

As to the rest of the gags in "Movie Crazy."

Adler, who suggested the magician's coat routine to Lloyd (for "Welcome Danger," for which it was first made but not used), testified:

"Q. (Cross-examination by Mr. Fendler): Did you and the other writers in working out this sequence here attempt to arrive at a unique combination of situations and scenes, or were you just trying to do something in the same combination and sequence that it had always appeared to the public before? A. About the same.

Q. But that was your idea? A. Yes.

Q. To have the same combination of scenes and sequence that had appeared previously, is that correct? A. I believe so.

The Court: You did not try to have anything unique?

The Witness: No. The only thing, I remember I suggested the egg. I don't think the egg gag was in there in 1928, and I suggested it in the 1932 version.

Q. By Mr. Fendler: You mean where the drunk hits his forehead with the egg? A. Yes.

The Court: You people did not try to do any original work, is that correct?

The Witness: Well, it is very hard to do a lot of original work.

The Court: I know, but this was not original?

The Witness: This was practically a facsimile to the thing that happened before.

By Mr. Fendler: I mean when you created Welcome Danger did you try and have an original combination of scenes that had not publicly appeared? A. We tried to get a basic angle once in a while. But, after all, it is hard to do, because I don't believe we ever had a story at any time. We were gag men." [Tr. pp. 330-331.]

"Q. By Mr. Fendler: Mr. Adler, did you collaborate with Clyde Bruckman on the writing of a picture at Columbia entitled Loco Boy Makes Good? A. Yes.

Q. Which contains this same sequence? A. I understand it does, but I don't —

Q. All right. Is this the first time that you ever heard about the Columbia picture which was written by you and Bruckman containing the magician's coat sequence throughout the second reel? A. I knew it contained it, but we did not put it in.

Q. Who did? A. I think Julius White put it in, the producer. When we write over there, we write a story and it is hard to recognize it after we get through." [Tr. p. 335.]

"Q. How did you and Julius White arrive at the creation of that particular sequence for your Columbia picture? A. Julius White sees every picture in the world, every comedy picture any place. All the writers in any one field, *it is already common property and it is a lot of exchange of gags. All comedians do it,* Stan Laurel, Laurel and Hardy, *all the comedians do the same gags.*" [Tr. p. 338.] (Italics ours.)

Bruckman's Participation.

At the time "So's Your Uncle" was in preparation by Universal, Bruckman was employed as a gag writer. Bruckman never heard of "So's Your Uncle" until the scenario had been completed. As completed, the scenario had a dance sequence at a night club, in which Steve, the hero, appeared both as his uncle and in his own character. [Tr. pp. 231, 235.] Mr. Yarbrough, the producer, handed Bruckman the scenario, saying he needed some comedy in the dance sequence. [Tr. p. 236.] He did not tell Bruckman what comedy material to introduce. [Tr. p. 236.] Bruckman typed up comedy material consisting of stage business connected with the magician's coat sequence, which later appeared in the picture as released. [Tr. p. 229.] He brought this to Yarbrough's attention, telling Yarbrough that Felix Adler and himself had used similar material in a Columbia picture entitled "Loco Boy Makes Good" in 1941, and "at that time it had been suggested by and patterned on the routine as done in Movie Crazy by Harold Lloyd." [Tr. pp. 237, 96.] Yarbrough handed the typewritten material prepared by Bruckman to Maurice Leo, its scenario writer, for inclusion in the scenario. [Tr. p. 229.] Asked by plaintiff's counsel as to his conversation with Yarbrough, Leo testified, "The substance was that he brought this material, telling me a friend had given it to him, who had used it in a picture at one time, and he thought it would work very well into our night club sequence; and he gave it to me and I looked at it and, if I am not mistaken, I was not too enthusiastic over it because I thought it was dated and old-fashioned; but he seemed to think that, despite that fact, he wanted to use it and he was the producer and so I used it." [Tr. p. 221.]

Bruckman was in the employ of plaintiff at the time "Movie Crazy" was made, and, together with Felix Adler and others, he worked on the magician's coat routine. As already stated, Adler had originally suggested the sequence for "Welcome Danger," an earlier Lloyd picture. It was made for that picture, but edited out. It was remade for "Movie Crazy." [Tr. pp. 232, 233.]

Bruckman testified that since prior to the time of his employment by the Harold Lloyd Corporation, during that time, and all times afterward, including the time he was employed at Universal, it was common practice to use comedy routines which had been used before, and to advise the directors of the source and origin, and that practice was followed between Bruckman and Harold Lloyd in behalf of Harold Lloyd Corporation during the term of Bruckman's employment by the Lloyd Corporation. [Tr. p. 238.]

Damages.

Lloyd played the leading role in "Movie Crazy." In fact, without Lloyd there would have been no picture at all. On the other hand, the leading role in "So's Your Uncle" was played by an unknown actor. The only player in "So's Your Uncle" with any box office appeal was Billie Burke, who played Minerva. [Tr. pp. 269, 271.]

Plaintiff released "Movie Crazy" in 1932, and exhibited it for three or four years. [Tr. p. 134.] It was then withdrawn from circulation, and has not been shown since. It grossed $1,439,182.21. The production cost was $652,853.26. The distribution cost was $414,010.14. The net returns were $372,318.81. [Tr. pp. 178, 179.] Columbia released "Loco Boy Makes Good" in 1942. It was shown over a period of 162 weeks in 7065 theaters.

[Tr. pp. 390, 391.] Universal released "So's Your Uncle" in December, 1943. It was exhibited until April 26, 1945, when it was withdrawn. It was shown in 6636 theaters, many of them the same theaters in which "Loco Boy Makes Good" was shown, and all, or practically all, of them were of the same character. [Tr. p. 82.] It grossed $208,812.92. The production cost was $133,-874.50. The distribution cost was $54,421.14. The net returns were $20,517.28. [Tr. pp. 476, 477.]

For over a year and three months, while the distribution and exhibition of "So's Your Uncle" was taking place, plaintiff, its officers or agents, made no claim that such distribution and exhibition were in any respect injurious to plaintiff. [Tr. p. 385.]

There had been a brisk business in the reissue of old pictures, particularly during the war, but there was no market. Each transaction was the result of bargaining and bickering. [Tr. pp. 434, 436.] Many old pictures have been remade, but no picture of the character of "Movie Crazy" (that is to say, a picture which was not a true comedy, but merely made up of comedy situations) except a single picture that was remade by the owner and released the night before the final day of the trial. [Tr. pp. 448, 354.]

Plaintiff has never sold, or offered for sale, or received a bid upon, any of the pictures owned by it, including "Movie Crazy." [Tr. p. 136.]

No evidence was offered that any one ever attended "Movie Crazy" because of the magician's coat routine or that at the present time any one remembered the routine.

The trial judge, however, undertook to supply this deficiency in the evidence in his opinion from the bench, in which he said:

> "I find that that is about the only sequence that people who saw the picture in days gone by remembered. When you ask a person: 'Have you seen the picture?' they say, 'I don't remember it.' And then you tell them about this sequence and then they start to tell you about it and it is a matter of more or less common knowledge that that was an outstanding sequence." [Tr. pp. 521-522.]

Between 1932 and 1938 Harold Lloyd played in only two to four pictures. He did not remember the exact number. Since 1938 he has not played in any pictures that have been exhibited to the public. In 1945 he was no longer regarded as a star, and had no box office appeal. [Tr. p. 428.] He reluctantly admitted to being fifty-one years old [Tr. pp. 111, 112], and it is at least doubtful whether he could still play the comical youthful pranks and antics that made up "Movie Crazy."

James Geller (who was in the employ of Universal and for three years had been chief story editor of Warner Bros., handling all writers and the selection of materials, and had theretofore been in the agency business handling writers and material for a period of eight or nine years, and had theretofore been on the staff of a New York newspaper, and a writer and author contributing to magazines) testified that "Movie Crazy" could be reissued only as a museum piece. [Tr. p. 267.] There was other testimony to the same effect. [Tr. p. 448.]

Mr. Geller also testified:

> "The basic feature of *Movie Crazy* has been done a number of times, where you have a yokel come to Hollywood to get in motion pictures. It was done in Harry Leon Wilson's play *Merton of the Movies;* and it has been done in a series of pictures—one crashing Hollywood. There is nothing novel or essentially novel about it. It has passed its vogue. * * * I think it is like styles; it has gone out of fashion." [Tr. p. 268.]

Plaintiff was permitted, over defendants' objections, to call expert witnesses as to damages. [Tr. p. 102.]

Plaintiff called Harold Lloyd, Arthur M. Landau, and A. M. Botsford.

Lloyd and Landau testified that the reissue and remake rights of "Movie Crazy" had not been damaged at all by "Loco Boy Makes Good." [Tr. pp. 400, 374.] Botsford testified that the reissue and remake rights of "Movie Crazy" had been damaged by "Loco Boy Makes Good," but the damage was negligible. [Tr. pp. 464, 465.]

The court concluded, however, that "Movie Crazy" had been substantially damaged by "Loco Boy Makes Good." [Tr. p. 521.]

Lloyd testified that in his opinion the reissue rights of "Movie Crazy" were worth $100,000.00 and $200,000.00, hibition of "So's Your Uncle," and that the remake rights of "Movie Crazy" were worth $200,000.00 or more prior to the exhibition of "So's Your Uncle," and that after the exhibition of "So's Your Uncle" the value

of these rights was "practically destroyed." [Tr. pp. 104, 105.]

Landau testified that the reissue and remake rights of "Movie Crazy" were worth $100,000.00 and $200,000.00, respectively, prior to the exhibition of "So's Your Uncle," and practically nothing thereafter. [Tr. p. 257.]

Botsford testified that in his opinion the reissue rights of "Movie Crazy" were worth "somewhere around $100,000.00" prior to the exhibition of "So's Your Uncle" [Tr. p. 462], and the remake rights of "Movie Crazy" were worth "along about $125,000.00 or $150,000.00" prior to the exhibition of "So's Your Uncle" [Tr. p. 467], and both the reissue and remake rights were worth practically nothing after the exhibition of "So's Your Uncle." [Tr. p. 467.]

The only reason given by Lloyd for his opinions relative to the value of the reissue and remake rights of "Movie Crazy" and their destruction by the exhibition of "So's Your Uncle" was that "Movie Crazy" could no longer be made with the magician's coat routine, and if it were made with the magician's coat routine people would probably think he was an imitator, and that because of the showing of the routine sequence in "So's Your Uncle" people probably would not care to see "Movie Crazy." [Tr. p. 150.]

The only explanation given by Landau for his opinions on the same subjects was that he assumed the exhibitors would not care to buy "Movie Crazy" after the exhibition of "So's Your Uncle." [Tr. p. 258.]

Botsford gave no reason for his opinions on the subject in question. [Tr. pp. 453, 470, 477-478.]

None of plaintiff's witnesses undertook to state, or even estimate on a theoretical basis, what the gross returns would be on the reissue or remake of "Movie Crazy," or what the distribution costs would be on a reissue, or the production and distribution costs on a remake.

Defendants called expert witnesses in response to those called by plaintiff. These witnesses testified that in their opinions the reissue or remake rights of "Movie Crazy" had not been damaged at all by "So's Your Uncle." [Tr. pp. 268, 298.]

In fixing damages, the trial court said:

> "Mr. Lloyd testified, I believe, that he estimated his damages at $300,000.00. I cannot accept that figure. I do not believe that the reissue value of a picture that originally cost $650,000 or thereabouts, is worth fifty per cent of its original cost after the lapse of time involved here. Similarly I am not impressed with the claim that the value of the picture has been completely destroyed. I feel that that picture still has and will continue to have certain value after a lapse of a reasonable length of time. * * *
>
> "* * * It is my function to try to ascertain an amount that I believe is the actual damage suffered and in arriving at actual damages I base them upon what in my opinion is the lessened value of that copyright. In other words, I believe that in a case of this character the only way that actual damages could be established would be to determine the lessened value of the picture by reason of the infringement. There may be other ways, but that is the method that I have followed in this case. I find and fix the actual damages suffered by Mr. Lloyd in the sum of $40,000.00." [Tr. p. 522.]

The finding as to damages was "that plaintiff's *rights to reissue and remake* said motion picture photoplay entitled 'Movie Crazy' were substantially damaged and impaired by reason of said infringing acts of defendants but that the extent to which said rights were impaired and damaged did not and does not exceed the sum of $40,000.00." [Tr. p. 36.] (Italics ours.)

Specifications of Error.

1. Plaintiff's complaint does not, nor does any count therein, state facts sufficient to constitute a cause of action or to entitle it to relief.

2. The court erred in not entering a judgment of dismissal.

3. The court's findings of fact are not supported by the evidence, and are insufficient to support the judgment.

4. The court's judgment is contrary to law.

5. The evidence shows that plaintiff's motion picture photoplay entitled "Movie Crazy," particularly the portion thereof referred to as the magician's coat sequence or comedy routine, was not entitled to protection under the copyright laws of the United States, in particular subdivision (d) of Section 1 of the Copyright Act, because said motion picture, as well as all of the portion thereof specifically referred to, was not original but was commonplace, and said sequence or comedy routine was not an integral part of the story of "Movie Crazy."

6. The evidence shows that plaintiff's motion picture photoplay entitled "Movie Crazy," particularly the portion thereof referred to as the magician's coat sequence or comedy routine, was not entitled to protection under the copyright law of the United States, particularly subdivision (d) of Section 1 of the Copyright Act, as a drama or dramatic composition, because said motion picture, as well as the portion thereof specially referred to, consisted of entertainment other than drama or dramatic composition.

7. The evidence shows that the portion of plaintiff's motion picture photoplay entitled "Movie Crazy" referred to as the magician's coat sequence or comedy routine was not infringed by the motion picture photoplay "So's Your Uncle," because any of the matter embraced in the motion picture photoplay "So's Your Uncle" that is found in said sequence and comedy routine is commonplace and was used differently in "So's Your Uncle" as to characters, characterization, motivation, treatment, action and/or sequence of action.

8. The court's finding that the so-called magician's coat sequence was copied and misappropriated by defendant Bruckman in defendant Universal Pictures Company, Inc., motion picture photoplay entitled "So's Your Uncle" from plaintiff's motion picture photoplay entitled "Movie Crazy" is without support in the evidence and is contrary to the evidence; and the court's finding that the characters, characterizations, motivation, treatment,

action, and sequence of action appearing in the fourth reel of the motion picture photoplay entitled "So's Your Uncle" were knowingly and wilfully copied, misappropriated, and plagiarized from a portion of plaintiff's motion picture photoplay entitled "Movie Crazy," is without support in the evidence and is contrary to the evidence.

9. The evidence shows that plaintiff did not suffer actual damage from the writing, production, distribution, release, or exhibition of the motion picture entitled "So's Your Uncle," and that defendant Bruckman did not participate in the production or distribution or release or exhibition of the motion picture photoplay entitled "So's Your Uncle."

10. The court's finding that plaintiff has been damaged in the sum of $40,000.00 is without support in the evidence and is contrary to the evidence which shows that plaintiff suffered no damage whatever, and said finding is based entirely on speculation and conjecture.

11. The court's finding "that plaintiff's rights to reissue and remake 'Movie Crazy' had been damaged is insufficient in law, because plaintiff has not, and never had, a monopoly of the right to remake 'Movie Crazy.'"

12. The damages awarded by the court against Defendant Bruckman are excessive.

13. The court's finding that a reasonable attorney's fee to be awarded the plaintiff is the sum of $10,000.00 is without support in the evidence, and is contrary to law.

Brief of Argument.

A.

PLAINTIFF'S COMEDY ROUTINE IS NOT WITHIN THE PROVISIONS OF SUBDIVISION (D) OF SECTION 1 OF THE COPYRIGHT ACT, BECAUSE IT IS COMMONPLACE, AND IF IT WERE WITHIN THE PROVISIONS OF SUBDIVISION (D) OF SECTION 1 THERE WOULD HAVE BEEN NO INFRINGEMENT, BECAUSE THE COMEDY ROUTINES WERE DISSIMILAR AND NO ONE COULD HAVE BEEN DECEIVED.

The finding that "Movie Crazy" is "an original motion picture photoplay * * * constituting copyrightable subject matter under the laws of the United States" [Tr. p. 33], as applied to the magician's coat routine is contrary to the evidence. The routine is made up of commonplace materials. It is not an integral part of the story in "Movie Crazy." It contains no theme at all, much less an original theme. If there is any originality, it consists of the order in which the commonplace materials are arranged. This is not sufficient to make it copyrightable. The finding that "the so-called magician's coat sequence * * * was copied and misappropriated by defendants" is likewise contrary to the evidence, as is the finding "the characters, characterization, motivation, treatment, action and sequence of action" in "So's Your Uncle" is the same as in "Movie Crazy." [Tr. pp. 34-35; *ante,* pp. 17-22; 9-14.] The evidence is that the magician's coat routine in "So's Your Uncle" was only suggested by and modeled after the routine in "Movie Crazy," and that the materials

borrowed are confined to gags, and stage business, and the order in which they appear. The backgrounds, settings, incidents, characters, dialogue, and the purposes to which the materials are put are all entirely different in "So's Your Uncle" than in "Movie Crazy." [*Ante,* pp. 12-16.]

The carefully considered case of *Harold Lloyd Corporation v. Witwer,* 9 Cir. (1933), 65 F. (2d) 1, is squarely in point. In that case this court reversed a judgment for plaintiff, although the similarities between the alleged infringing photoplay and the previously copyrighted story were far more striking than they are here, and the judgment rested on a finding similar to the finding here.

The finding there was that "substantial parts and portions of the Witwer story have been used, copied and appropriated by appellants including story structure, plot, gags, sequences of incident, event and situation * * *." (65 F. (2d) 19. For the finding here see *ante* p. 6.)

In the *Witwer* case, similarities to the story not only run through the whole photoplay, but are found in a comedy routine in the play that is similar to comedy situations in the very climax of the story. Here the similarities are in a single comedy routine which is not even an integral part of plaintiff's story. [*Ante,* pp. 8-11.]

In the *Witwer* case, in both the story and the play the hero was a college boy who aspired to popularity and athletic prowess. Each aspired to be called by a nickname. Each paraded in a sweater with a college letter. Each practiced football plays before a mirror. Each tried for the college team. Each failed. Each forced his way into the final game—the climax in both the story and the play—over the protest of the coach, and each

saved the day for the team by fantastic plays. Each courted a girl and did not win her until after the game.

But there were differences. Rodney in the story was an unattractive grind, and went out for athletics for their own sake. Harold in the story was a lovable fool who cultivated athletics as a means to popularity. Rodney was a weakling. Harold was a sturdy lad. Each met the girl under different circumstances. The attitude of the girl toward each was different. At the end of the football game Rodney emerged as a hero, and Harold as a "boob."

In reversing the case, this court held:

(1) "Unless the public is deceived by the pictures, and led to believe that the films are a picturization of plaintiff's literary work (the *standard of the ordinary observer* being applied) then no infringement is shown." (65 F. (2d) at p. 19.) (Italics are the Court's.)

(2) The only originality protected by copyright is originality in a theme.

(3) A subordinate sequence, not an integral part of the story as a whole, is not protected by copyright.

(4) Borrowing commonplace materials and using them differently does not constitute infringement, and "differences in the appearance, name, and character of Rodney and Harold and in the football scene" were sufficient to negative infringement. (65 F. (2d) at p. 28.)

Noting the similarities and differences mentioned above, and many others, Wilbur, Circuit Judge, who wrote the opinion for the court (McCormick, District Judge, dis-

senting), addresses himself to "what is copyrightable in plot, scene, or sequence of events in the story," saying:

> "The dramatic and moving picture rights of a copyrighted story do not cover words (citing authority), voice, motions, or postures of actors (citing authorities), or a plot (citing authorities), but an original novel treatment of a theme (citing authorities)" (p. 22).

As to the effect of copying a part of a copyrighted work, Judge Wilbur says:

> "The rule is well settled that matters in the public domain are not copyrightable, and we understand that the appellee concedes this and limits her contentions to what she considers the novel features of the story appropriated in the play. On this subject, Weil in his work on the 'Law of Copyright,' states the law as follows:
>
> "Section 983. 'It should also be borne steadfastly in mind, that if a work is not entirely original, there is no copyright in the unoriginal part, which will prevent its use, separately, or in combination, with matter not covered by copyright. Hence, of course, any inquiry as to infringement must exclude *permissible reproduction* of such *non-original matter.*'" (Italics are the Court's.) (p. 24).

Judge Wilbur gives particular attention to the parts of the story and play relating to the football game.

As it is found in the story, Judge Wilbur says:

> "The climax of the Rodney story is in the football game in which he earns fame with his school-

mates and becomes a football hero in the annals of the college. Moved by a desperate desire to redeem himself with the heroine Rodney argues for a right to go on the field in the last five minutes of the game when his college is losing, takes advantage of the silence and uncertainty of the coach and rushes on the field to take the place of a disabled player. In his excitement he forgets the signals, although he claimed to the coach to know them. The ball is thrown to him and without passing it, as the signals require, he runs down the length of the field and makes a touchdown, which not only wins the game but the plaudits of his classmates as well" (p. 3).

As to the similar sequence in the play, Judge Wilbur says:

"Harold Lamb also goes upon the field in the last five minutes of play when the score is against his team. He makes a touchdown, but instead of one successful play there are eight different plays, in each of which Harold demonstrates to the audience that he is a complete ignoramus and knows nothing about the game. On one play, although unopposed, he puts the ball down within two feet of the goal line on hearing a locomotive whistle, because the referee has told him on a previous play that when the whistle blows he must 'down the ball.' Harold Lamb believes in himself, takes his efforts with the utmost seriousness, has no doubt of his ability to participate in the game and win it, and actually does win it, but by a fluke, as was obvious to all concerned. Instead of becoming a football hero he is considered a boob and ridiculed as such" (p. 4).

In holding that the football sequence in the play does not infringe the football sequence in the story, Judge Wilbur says:

> "The only thing in the play approximating a duplication of a scene in the story is that in which the hero argues with the coach in reference to participating in the final plays of the football game. In each case there is an argument, but the scene, considered independently from the story and the play merely as a scene or a subordinate sequence of events, is utterly commonplace and incapable of copyright monopoly. It is immaterial, therefore, whether or not there is copying" (p. 27).

In holding that borrowing commonplace materials and using them to a different purpose does not constitute infringement, Judge Wilbur quotes at length from the findings of the District Court and the argument of counsel as to the similarities between the play and the story (65 F. (2d) 19, 20, 22, 23). The quotations are too lengthy to set out here.

After quoting from the opinion of the District Court, Judge Wilbur comments:

> "The plaintiff does not state what is new or novel about this plot or sequence of events found by the trial court, or about the matter claimed to have been copied or appropriated from the story. There is nothing abnormal about a college freshman desiring to succeed in athletics or desiring to be popular or to be called by a nickname. Rodney was abnormal, because, although an exceptionally fine scholar, he desired to be considered an ignoramus." * * *
>
> * * * * * * * *

"Rodney was neither abnormal nor unusual in that, although having developed no athletic ability, he desires to become an athlete. Harold Lamb was abnormal only in that, in his desire to be popular and to do what he thought was the popular thing to do, he committed absurdities so enormous as to immediately attract the attention of his prospective schoolmates, so that in the very first contact with him they play a number of pranks on him and take advantage of his ignorance and desire to please" (p. 20).

Placing himself in the "attitude of a fairly indifferent and disinterested spectator of the moving picture play, 'The Freshman'," Judge Wilbur concludes:

"* * * IT WOULD OCCUR TO SUCH A SPECTATOR in the absence of suggestion to that effect, THAT HE WAS SEEING IN MOVING PICTURE FORM THE STORY OR ANY PART OF THE STORY OF THE 'EMANCIPATION OF RODNEY,' THIS BECAUSE OF DIFFERENCES IN THE APPEARANCE, NAME, AND CHARACTER OF RODNEY AND HAROLD AND IN THE FOOTBALL SCENE. IF THIS IS TRUE, THERE IS NO COPYING AND NO INFRINGEMENT. If we can see at first blush that there is no such similarity as would impress the ordinary observer, it is unnecessary to consider the question of novelty or copyrightability of such similarities as exist. We are of opinion that SUCH SIMILARITIES AS EXIST BETWEEN THE PLAY AND THE STORY, AND THERE ARE MANY, are such as require analysis and critical comparison in order to manifest themselves. THE OUTSTANDING FEATURE, THE CLIMAX OF BOTH STORY AND PLAY, IS THE FOOTBALL GAME, WITH NECESSARILY SOME SIMILARITY, BUT THERE IS NOTHING NEW AND NOVEL IN THAT OTHER THAN THE UNUSUAL PARTICIPATION OF THE HEROES IN THEIR RESPECTIVE GAMES, AND ON ANALYSIS THESE ARE NEITHER IDENTICAL NOR SIMI-

LAR IN SCENE NOR IN CONCEPTION OF THE TWO PRODUCTIONS." (65 F. (2d) pp. 27-28.)

Harold Lloyd Corporation v. Witwer, supra, is supported by cases in other jurisdictions handed down both before and since that decision.

In *MacDonald v. Du Maurier,* 2 Cir. (1914), 144 F. (2d) 696, it is said:

> "Ideas or basic plots are not protected by copyright. (Citing cases.) Neither are isolated incidents, (citing cases), nor even groups of incidents following necessarily or naturally from the plot or environment. (Citing cases.)" (p. 700).

In *Barnes v. Miner,* C. C., S. D., N. Y. (1903), 122 Fed. 480, 492, the court said:

> "What is there that is novel in changing costumes or clothing?"
>
> * * * * * * * *
>
> "* * * The order of events in plaintiff's exhibition is of no materiality whatever" (pp. 491, 492).

In *Caruthers v. R. K. O. Radio Pictures,* D. C., S. D., N. Y. (1937), 20 Fed. Supp. 906, the court said:

> "Even if the defendant had the episode of Isaiah and the cake suggested to it by the episode of Percy and the fan, it would not constitute any basis for a decree in the plaintiff's favor, for the episode of Percy is merely glanced at as a supposedly *comic accretion to the story of the manuscript, and is not intrinsic to the development thereof"* (p. 907). (Italics ours.)

In *Glazer v. Hoffman,* Sup. Ct., Fla. (1943), 16 So. (2d) 53, it was held that an elaborate sleight-of-hand

performance developed by a magician, by which he produced drinks or beverages, such as highballs, cocktails, liqueurs, zombies, coffee and ice cream sodas from metal cocktail shakers, which were shown to be empty, and from beakers filled with water, as requested by members of his audience, was not protected by the provisions of the Copyright Act.

The following is from the opinion:

> "In the case of Serrana v. Jefferson, C. C., 33 F. 347, the Court held that a mechanical contrivance consisting of a real tank, into which real water was made to flow and running thence off underneath the stage, representing a bridge above, *not being a link in the chain of incidents which, together with the speech and action of the performance, is not* such a mechanical contrivance as *entitled it to protection by copyright.*" (Italics ours.)

Barnes v. Miner, supra (122 Fed. 480), is instructive on its facts.

Plaintiff's performance consisted of the singing of well-known songs by a woman dressed to impersonate other singers, prefaced by a short dialogue, with a motion picture exhibition during the intervals when the performer was changing costumes. Plaintiff, Hattie Delaro Barnes, first appeared on the stage in opera cloak and evening dress, in front of a drop curtain behind the footlights, and gave a dialogue in which she said she would show quick changes of costumes in the dressing room by motion pictures. She left the stage and retired to her dressing room. While plaintiff was in her dressing room rapidly changing her costume from evening clothes to garments such as were worn by Anna Held, there was

thrown on the screen a series of moving pictures showing the plaintiff in the act of making the quick changes of costume in her dressing room. Plaintiff then appeared on the stage, dressed as Anna Held, and sang a song. After singing the song, she left the stage. Motion pictures were then thrown on the screen showing her changing her costumes from that of Anne Held to that of a boy. She then later appeared on the stage in the character of a boy.

The defendant's act showed the defendant, Adolph Zink, a man of small stature, in conventional evening clothes, who announced he would impersonate several well-known actors and actresses, and make quick changes from one character to another, first showing himself as Edna May, and then as May Irwin, and finally as Bath House John of Chicago. Zink did the various impersonations with singing. During the intervals, motion pictures showed him changing his costumes while he was in his dressing room.

The court held that plaintiff's act was not copyrightable, and defendant did not infringe it.

In reviewing cases holding that commonplace materials differently used do not constitute infringement, it is said in *Harvard Law Review,* vol. 44, at page 631:

> "In *Curwood v. Affiliated Distributors,* [283 Fed. 223 (S. D. N. Y. 1922)], the plaintiff's murder mystery was found not to be infringed by the defendant's motion picture, which lacked the mystery element even though a series of incidents in the picture might have been a colorable imitation of a scene from the plaintiff's story. The tendency to deny recovery is well illustrated in the litigation over *The Spider.* [*Rush v. Oursler,* 39 F. (2d) 468 (S. D. N. Y.

1930).] Here a series of incidents climaxed by the highly dramatic murder of a supposed member of the audience was denied protection largely because the solution of the murder differed in the two plays. Where the underlying themes of the works are radically different, the solution is easier. Thus in *Frankel v. Irwin,* [34 F. (2d) 142 (S. D. N. Y. 1929)] despite the similarity of exciting moment, the defendant's play, with its ensuing character study, could hardly have been termed a colorable imitation of the plaintiff's elementary farce of incident."

The following is from the opinion in *Curwood v. Affiliated Distributors,* S. D. N. Y. (1922), 283 Fed. 223, the first case cited in the above excerpt from the Harvard Law Review:

"Without undertaking an analysis of 'Across the Pacific,' 'Chinatown Charlie,' and other 'thrillers,' the foregoing adequately shows that there can be no finding that the writer of the scenario complained of infringed upon Curwood when he had his hero ascend a flight of steps and enter the luxuriantly furnished living room of the Chinaman, and that on making his entrance the hero noticed a kneeling figure. The den in 'The River's End' and that in 'I Am the Law' are not of the same type. The latter is a dive of the worst imaginable character; the former is 'high-toned'" (p. 227).

In *Rush v. Oursler,* D. S. C. D. N. Y. (1930), 39 F. (2d) 468, the second case cited in the above excerpt from the Harvard Law Review, the court said:

"An ordinary observer of the three plays here involved would undoubtedly form the impression that

they were of the same type and had utilized the same material—that is, a shooting in a theater and the solution of the crime. * * * The differences in the plays are more striking than their similarities, which relate only to the actual occurrence of the murder, and not to the solution of the mystery.

"The inquiry always is: What, if anything, has been appropriated; and then, whether the appropriation was of copyrighted material and was substantial. Dymow v. Bolton (C. C. A.), 11 F. (2d) 690. The interruption of a stage performance by a murder in a crowded theater of a person seated in the audience is a dramatic incident which *per se* is not copyrightable, and no one could by obtaining a copyright withdraw from others the right to portray such an occurrence in literary or dramatic form" (pp. 472-473).

In *Frankel v. Irwin,* D. C. S. D. N. Y. (1918), 34 F. (2d) 142, the case last cited in the above excerpt from the Harvard Law Review, the court referred to "farces, which, unless at least suggestive of genuine human thoughts, desires, and intents, are mere slapstick clowning," (p. 144) and said:

"Thus I think the first inquiry is as to words used, and the structure of sentences; here there is no similarity at all. Next as to the spirit or purpose of the two plays; plaintiff's is an elementary farce of incident, *e. g.,* the acceptance of the daughter's lover is infinitely less important than the unexpected mechanical piano player that starts when the father bumps against a knob in a darkened room. Defendant's novel, however, has a definite theme, viz., the cure of false pride in a really kind and upright

woman, when, as the result of stooping to deceive, she discovers some, at least, of the human values, and many of the petty difficulties of life, previously ignored as beneath her station. This scheme is worked out in thoroughly conventional manner in Scott's novel, through entanglements with the lover of the servant whose identity is assumed, a theme at least as old as the Italians Chaucer borrowed from, and accusations of wrong based on mistaken identity, a plan Shakespeare shamelessly took from Plautus" (p. 145).

B.

PLAINTIFF'S COMEDY ROUTINE IS NOT WITHIN THE PROVISIONS OF SUBDIVISION (D) OF SECTION 1, BECAUSE, WHILE IT IS ENTERTAINMENT, IT IS NOT DRAMATIC COMPOSITION.

The magician's coat routine in "Movie Crazy" is not drama. It tells no connected story. It does not portray life. It is made up entirely of commonplace incidents, and changing of clothes, clowning, dancing, sleight-of-hand, stage business, and circus tricks.

"Farces," says Hough, Circuit Judge, in *Frankel v. Irwin, supra,* "which, unless at least suggestive of genuine human thoughts, desires, and intents, are mere slapstick clowning." (34 F. (2d) at 144.)

In *Corcoran v. Montgomery Ward & Co.,* 9 Cir. (1941), 121 F. (2d) 572 [certiorari denied 314 U. S. 687], this court held that "doggerel verse entitled 'Plain Bull,' consisting of thirteen four-line stanzas descriptive of a cowboy's attempt to put his brand on a maverick bull, which, incidentally, proved to be by no means a

counterpart of the gentle Ferdinand" was not dramatic composition.

Healy, Circuit Judge, speaking for the court, said:

> "* * * in any event the poem is not properly classifiable as a dramatic work. * * * While the poem has action in plenty, it lacks in the form in which it was written certain of the qualities of a dramatic work, notably dialogue and a perceptible plot." (121 F. (2d) p. 574.)

In *Seltzer v. Sunbrook,* D. C. S. D., Calif. (1938), 22 Fed. Supp. 621, the late Judge Jenney, in holding that a roller skating derby was not within the provisions of Subdivision (d) of Section 1, discussed the difference between entertainment that is, and entertainment that is not, dramatic composition.

Referring to the Copyright Act as a whole, Judge Jenney said:

> "* * * Even a cursory reading of the act reveals the fact that certain provisions thereof pertain to all copyrighted matter, while others relate specifically to music, or to the drama or to some other special category. The precise scope of each class therefore becomes important in ascertaining the extent to which special provisions apparently applicable to one class may be governing as to other copyrighted matter. The statute itself is silent on this point. There are no clauses creating definite boundaries for each classification. Accordingly, that problem has fallen to the courts, which have been compelled to limit the subject-matter to be included in each class—in the light of the traditional purposes of copyright law and with due regard to the additional safeguards against piracy which the various amend-

ments to the act have provided." (22 Fed. Supp. p. 627.)

Turning to "dramatic compositions," Judge Jenny said:

> "The courts, in determining what constitutes a dramatic composition, have emphatically stated that there must be a story—a *thread of consecutively related events*—either narrated or presented by dialogue or action or both. (Citing authority.) Attempts have been made to extend the protection afforded dramas under the act to other forms of composition spectacular in nature and theatrical in presentation, but lacking the story element. Even in the early days of interpretation of the Copyright Act, however, the distinction between a mere exhibition, spectacle, or arrangement of scenic effects on the one hand, and a true dramatic composition on the other, was well recognized." (22 Fed. Supp. pp. 628-629.) (Italics ours.)

Judge Jenney then reviewed the case of *Martinetti v. Maguire,* 16 Fed. Cas. p. 920, decided in 1867, in which it was held that a spectacle showing "the exhibition of women in novel dress or no dress, and in attractive attitudes or action," with dialogue that is "very scant and meaningless," was not drama. (22 Fed. Supp. p. 629.)

Judge Jenney continued:

> "Since the time of that decision, repeated efforts have been made to secure an enlargement of the scope of copyright law so as to provide protection for various new forms of originality. Congress, in subsequent amendments to the act, has made provision, in additional classifications, for certain new types of composition, notably motion pictures. But

> none of these revisions, including the very significant one of 1909, have added anything to the act to change the original definition of a 'drama' as enunciated by the courts. New media in which dramas could be presented were recognized. New provisions have sweepingly prohibited unauthorized dramatizations of any kind by any means whatsoever. (Citing Section 1(d).) But there has been no statutory abandonment of any of the fundamentals previously held indispensable to a genuine dramatic composition.
>
> "The courts likewise have clung to first principles and have refused to extend the definition of a 'drama' to include other forms of composition having no *bona fide* plot or story." (22 Fed. Supp. p. 629.)

Copyright protection was first extended to dramatic compositions by Congress in 1856.

> Thorvald Solberg, *Copyright Enactments of the United States,* (1783-1906), p. 43.

Inasmuch, as Judge Jenney points out, none of the revisions "have added anything to the act to change the original definition of a 'drama' as enunciated by the courts," it is significant that before 1856 the difference between drama and grotesque hobbledehoy such as the magician's coat routine was clearly understood.

In *Professor Jacko v. The State* (1853), 22 Ala. 73, it was held that a license to keep a theatre did not protect the plaintiff in error from criminal prosecution for exhibiting feats of sleight-of-hand and legerdemain, and clownish dialogues and scenes.

Said the court:

> "* * * The term 'drama' as defined by Mr. Webster, means a poem or composition representing a picture of human life, and accommodated to action. It may be conceded, that its signification is broad enough to cover any representation in which a story is told, a moral conveyed, or the passions portrayed, whether by words and actions combined, or by mere actions alone; yet it would by no means follow, that the terms 'theatre' and 'circus' were synonymous or convertible terms. * * * They may both be arranged under the general term 'amusements,' but differ from each other as one species differs from another under the same genus."

In *Thurber & Atkin, Overseers of the Poor of Delhi v. Sharp* (N. Y. 1852), 13 Barbour 627, the court had the following statute before it:

> "No person shall exhibit or perform for gain or profit, any puppet-show, any wire or rope dance, or any other idle shows, acts, or feats, which common showmen, mountebanks, or jugglers usually practice or perform"; (pp. 627-628).

The court upheld a conviction under this statute of white persons who appeared in public for gain, dressed and disguised as negroes, and imitated their language and actions, sang negro songs, performed dances in grotesque manner, and did pretended feats as psychologists and mesmerizers.

A similar conviction under the same statute had been upheld against circus performers in 1834 in *Downing & Potter, Overseers of the Poor of Ithaca v. Blanchard* (N. Y.), 12 Wendell's Reports (2nd Ed.) (1834), p. 383.

Section 201.4 of *Code of Federal Regulations of the Copyright Office* provides:

> "The designation 'dramatic composition' does not include the following: Dances, motion-picture shows; stage settings or mechanical devices by which dramatic effects are produced, or 'stage business'; animal shows, sleight-of-hand performances, acrobatic or circus tricks of any kind; scenarios for, or descriptions of motion pictures or of settings for the production of motion pictures."

While the provision of the Code of the Copyright Office above quoted was promulgated for the convenience of the Copyright Office in administering Section 5 of the Copyright Act, the rule is based on and correctly summarizes the case law on the subject.

In *Fuller v. Bemis,* C. C. S. D. N. Y. (1892), 50 Fed. 926, the court held that three elaborate tableaux, the performance of which required a considerable portion of, if not an entire, evening, did not constitute a dramatic composition, and were not protectable by copyright.

In that behalf, the court said:

> "An examination of the description of complainant's dance, as filed for copyright, shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion. The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition. Surely, those described and practiced

here convey, and were devised to convey, to the spectator, no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion. Such an idea may be pleasing, but it can hardly be called dramatic" (p. 929).

In *American Mutoscope & Biograph Co. v. Edison Mfg. Co.,* C.C.N.J. (1905), 137 Fed. 262, after holding on the authority of *Edison v. Lubin,* 3 Cir. 122 Fed. 240, that a motion picture was copyrightable as a photograph (the classification given by the Copyright Office, before the amendment of 1912 to Section 5),[1] the court denied a preliminary injunction on the ground that it did not appear that defendant's motion picture had been copied from defendant's film, and there was a question as to whether it was not a similar picture made independently.

The following is from the opinion:

"We are brought, therefore, to the consideration of the question as to whether a preliminary injunction should be allowed. The affidavits show that the defendant also has had its series of pictures duly copyrighted, and that they were taken by placing its camera at two or three points near Gen. Grant's Tomb and at other places in a country district in New Jersey. The defendant's pictures were taken at times different from those of the complainant, and by securing a different set of actors, dressed in different costumes. In the first scene of each photograph Gen. Grant's Tomb is visible, and before it appears a man, who is soon met by several women, who crowd about him, and from whom he attempts to run away. In each of the photographs are successive

[1]See Appendix, p. 13.

scenes showing the man and the women running down the roadway leading from the tomb, and across fields and through hedges, and jumping over fences and down banks. The two photographs possess many similar and many dissimilar features. The defendant denies having copied any part of the complainant's photograph. Its photographer says:

'The negative prepared by me did not and does not contain a single copy of any of the pictures of complainant's films. Each impression is a photograph of a pantomime arranged by me, and enacted for me at the expense of the owner of the film which I produced. My photograph is not a copy, but an original. It carries out my own idea or conception of how the characters, especially the French nobleman, should appear as to costume, expression, figure, bearing, posing, gestures, postures, and action.' * * *

* * * * * * * *

"I am not prepared to say on the evidence now before me, that the defendant has appropriated the substance of any part of the complainant's copyright. The copying of the complainant's photograph is asserted on the one side and denied on the other. There has been no cross-examination of witnesses. * * *

"The conclusion is that the preliminary injunction must be denied." (pp. 267-268.)

The case is cited with approval in *Harper Bros. v. Kalem Co.*, 2 Cir. (1909), 169 Fed. 61, 63.

In *Chappell & Co. v. Fields,* 2 Cir. (1914), 210 Fed. 864, the court said:

"* * * the voice, motions, and postures of actors and mere stage business may be imitated because they have no literary quality and cannot be copyrighted." (p. 865.)

In *Bloom & Hamlin v. Nixon,* C. C. E. D. Pa. (1903), 125 Fed. 977, the court declined to enjoin the imitation of stage business appearing in the celebrated "The Wizard of Oz," consisting of "the rather striking impertinence" of making one of the audience uncomfortable by singling him out and singing to him.

In *Tate v. Thomas,* (1921), 1 Chancery Division 503, the court said:

> "* * * His assistance, such as it was, was confined to accessorial matters such as scenic effects, or stage 'business' not the subject matter of copyright." (p. 510.)

In *Tate v. Fullbrook,* (1908), 1 King's Bench Div., 821 (Court of Appeal), the court also held "stage business" was not the subject matter of copyright. The following is from the Report:

> "* * * There was also a considerable degree of family likeness as regards the comic 'business' in the two pieces—for instance, in both pieces one of the effects consisted in a cracker being placed by the street urchin under and exploded by the foot of one of the characters. It was also alleged that expressions were introduced into the defendant's piece by way of 'gag' which had been taken from similar 'gag' in the plaintiff's piece as performed." (p. 822.)

Glazer v. Hoffman, supra (16 So. 2d) and *Professor Jacko v. The State, supra* (22 Ala 73), both hold that sleight-of-hand and conjuring do not constitute drama.

Barnes v. Miner, supra (122 Fed. 480), holds that a vaudeville act, in which the changing of clothes is shown by motion picture during an intermission was not drama.

C.

PLAINTIFF'S PHOTOPLAY AS A WHOLE IS NOT WITHIN THE PROVISIONS OF SUBDIVISION (d) OF SECTION 1, BECAUSE IT IS COMMONPLACE AND IS NOT DRAMATIC COMPOSITION, BUT IS MERE SLAPSTICK CLOWNING.

"Movie Crazy" has no theme at all, much less an original theme. It does not portray life. It consists of gags and stage business strung on a thread of disconnected incidents, all of which are commonplace. Insofar as there is a story, it does not contain "a thread of consecutively related events," and is commonplace. The characters also are all commonplace, and too faintly delineated to be characters in real life. Harold is a slapstick comedian. Mary is a "movie queen" of bygone days. Vance is an old-time "heavy." O'Brien is a typical harassed executive. Kitterman is the conventional hard-boiled magnate, with a sense of humor. If there is any originality at all, it is in the order of the incidents, and in the gestures, postures, and facial expressions of Harold Lloyd, and that is not enough. (*Ante* pp. 23-26.)

It is submitted that the authorities reviewed under propositions A and B establish proposition C.

Special attention need only be called to the following:

> "Farces, which, unless at least suggestive of genuine human thought, desires, and intents, are mere slapstick clowning."
>
> *Frankel v. Irwin, supra,* (34 F. 2d at 144).

> "The dramatic and moving picture rights of a copyrighted story do not cover words (citing cases), voices, motions, or postures of actors (citing cases),

or a plot (citing cases), but an original novel treatment of a theme."

Harold Lloyd Corporation v. Witwer, supra, (65 F. 2d at p. 22).

"'*The plot is common property; no one by presenting it with modern incidents can appropriate it by copyrighting*'." (*Id.,* p. 24.) (Italics are the court's.)

" 'Nor does she fare better as to her character. It is indeed scarcely credible that she should not have been aware of those stock figures, the low comedy Jew and Irishman. * * * Even though we take it that she devised her figures out of her brain de novo, still the defendant was within its rights. * * * the lovers are so faintly indicated as to be no more than stage properties'." (*Id.,* p. 26.)

"Obviously the Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality. And we must, if possible, so construe the statute as to avoid holding it unconstitutional. Plaintiff therefore must lose unless he has shown that his work contains some substantial, not merely trivial, originality and that the defendant sold copies embodying the original aspects of his work." (Frank, Circuit Judge, in *Chamberlin v. Uris Sales Corporation,* 2 Cir. (1945), 150 F. (2d) 512, 513.)

In *Corcoran v. Montgomery Ward & Co., supra,* our Circuit Court of Appeals said:

"* * * Many prose compositions have been set to music.

"Whatever may superficially appear to be the justice of appellant's claim, it is to be remembered that his

> case is governed entirely by the statute. And while in the 1909 revision of the Copyright Act composers were given the exclusive right of recording their copyrighted musical compositions and the like right was granted to authors of copyrighted dramatic works, Congress did not see fit to give like protection to copyrighted poems, stories or works of that nature." (121 F. (2d) at p. 574.)

From what has been said, it is clear that "Movie Crazy" does not come within the protection of subdivision (d) of Section 1. Plaintiff does not, therefore, have the monopoly of "the stage rights" or "the play rights" given by subdivision (d) of Section 1. "Movie Crazy" may, perhaps, be regarded as a photograph, or series of photographs, and plaintiff may have a monopoly, under subdivision (a) of Section 1 of the "copy rights," *i. e.,* the right to multiple copies by making physical impressions and selling them. (See, *Bleistein v. Donaldson Lithographing Co.,* 188 U. S. 239, 248-250, 47 L. Ed. 460 (1903); *American Mutoscope & Biograph Co. v. Edison Mfg. Co.,* C. C. N. J. (1905), 137 Fed. 262; *Patterson v. Century Productions,* D. C. S. D. N. Y. (1937), 19 Fed. Supp. 30; aff'd 2 Cir. (1937) 93 F. (2d) 489; Cert. den. 303 U. S. 655, 82 L. Ed. 1114.) If not, plaintiff, like Corcoran or the designer of ladies' hats, or businessmen generally, must be satisfied with the money it has already made, or the money it will still make, by reason of the superiority of its product and its own enterprise.

D.

Appellant Bruckman Is Not Liable as an Infringer, Because He Had Nothing to Do With the Production, Release, or Exhibition of the Alleged Infringing Photoplay.

Section 25 of the Copyright Act provides:

> "That *if any person shall infringe the copyright* in any work protected under the copyright laws of the United States *such person shall be liable:*
>
> "(a) To an injunction restraining such infringement;
>
> "(b) *To pay* to the copyright proprietor *such damages* as the copyright proprietor may have suffered *due to the infringement,* as well as all the profits which the infringer shall have made from such infringement." (Italics ours.)

The complaint charges that "defendants and each of them infringed upon plaintiff's said copyright by producing and commencing distribution, release and exhibition to the general public * * * of a motion picture photoplay entitled 'So's Your Uncle'." [Tr. p. 4; *ante,* p. 4.] Plaintiff did not undertake to prove the allegations as to Bruckman. The evidence was that Bruckman was merely a writer in the employ of defendant Universal, and had nothing to do with the production, distribution, release, or exhibition of "So's Your Uncle" (*ante,* p. pp. 6, 27.) The court found that defendant Universal alone "produced, distributed, released and exhibited * * * said motion picture photoplay entitled 'So's Your Uncle' in violation of plaintiff's exclusive rights in and to its copyright upon said motion picture 'Movie Crazy'." [Tr. p. 35; *ante,* pp. 30-31.]

Bruckman did not violate subdivision (d) of Section 1 of the Copyright Act, because he did not perform or represent plaintiff's copyrighted work publicly. Hence, his acts were not within Section 35 because he did not "infringe," and plaintiff has not "suffered" any damages "due to the infringement."

The words "damages" and "profits" are used with the same limitations in section 25.

In *Washingtonian Pub. Co. v. Pearson,* C. A. D. C. (1944), 140 F. (2d) 465, 467, the court said:

> "The Copyright Act makes an infringer liable for the profits which 'the infringer' derives from the infringement. It does not make him liable for the profits which other infringers derive from the same infringement. The purpose of permitting recovery of profits is to prevent unjust enrichment. Both the language and the purpose of the Act indicate that the court was right in not requiring authors who made a nominal profit, and a printer who took a loss, to account for the profits which the publisher made."

In *Russell v. Briant,* 8 C. B. 836, 848, 137 Reprint 737, Wilde, C. J., said:

> "No one can be considered as an offender against the provisions of * * * [the act] so as to subject himself to an action of this nature, unless, by himself, or his agent, he actually takes part in a representation which is a violation of copyright."

It is said in 18 C. J. S.:

> "* * * persons in no way connected with, responsible for, or benefiting by, the infringement are not liable therefor merely because standing in some relation to the infringer." (§ 120, p. 238.)

E.

THERE WAS NO DIRECT EVIDENCE OF DAMAGE, AND NO RELEVANT DATA FROM WHICH DAMAGE COULD BE INFERRED, AND THE DAMAGES AWARDED WERE ENTIRELY CONJECTURAL AND INTERMINGLED WITH DAMAGES THAT ARE NOT RECOVERABLE.

To repeat the finding of the court as to damages:

> "The Court further finds that *plaintiff's rights to reissue and remake* said motion picture photoplay entitled 'Movie Crazy' were *substantially damaged* and impaired by reason of said infringing acts of defendants but that the extent to which said rights were impaired and damaged did not and does not exceed the sum of $40,000.00." [Tr. p. 36.] (Italics ours.)

The finding must fall because it is not based on evidence.

The only evidence as to damages was opinion evidence. Plaintiff's witnesses expressed the opinion that the damages were $300,000.00. Defendants' witnesses expressed the opinion that there was no damage whatever. (*Ante,* pp. 30-32.) There is an implied finding that all of the opinion evidence was untrue. The figure of $40,000.00 was nothing but a guess.

The finding must fall also because subdivision (d) of Section 1, whether read literally or read with the background and legislative history of the Act of 1909 and the 1912 amendments (see Appendix; *infra* pp. 3-4), and with subdivision (b) of Section 1, and Section 11 does not give plaintiff a monopoly of "remake rights" of "Movie Crazy."

Lloyd was at pains to explain that the remaking of an old picture means making an entirely new one, and only using the old one as a guide. [Tr. pp. 368, 369.]

In *White-Smith Music Pub. Co. v. Apollo Co.* (1908) 209 U. S. 1, 17, it was held that the reproduction of sheet music by music roll was not an infringement of the copyright of the music, saying:

> "The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer."

In *Corcoran v. Montgomery Ward & Co., supra,* this court said:

> "Appellant relies also on the provisions of subsection (b), giving the exclusive right 'to translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work * * *.' It is claimed that the recording with music constitutes the making of another 'version' of the poem, and also amounts to a dramatization of it.
>
> "The precise meaning of the phrase 'any other version' appears not to be settled by the decisions. The phrase has been held to apply to abridgements. (Citing authorities.) It has been suggested that it refers to versions of a literary nature. Ladas, The International Protection of Literary and Artistic Property (1938) p. 779. However that may be, we think what was done here does not constitute the making of another version of the poem within the

meaning of the statute. In the committee report referred to in the above note it was said that subsection (b) is 'consistent with the existing law as construed by the courts.' Something new would be imported into the law if appellant's position were to have judicial approval. White-Smith Music Publishing Co. v. Apollo, supra. And, if the phrase were to be construed so broadly as appellant claims it should be, the many provisions of the act dealing with particular versions would be rendered superfluous, as, for example, the provision in subsection (d) giving the proprietor of a dramatic work a monopoly of the right 'to make or procure the making of any transcription or record thereof'." (121 F. (2d) 573.)

In *Arnstein v. Edward B. Marks Music Corporation,* 2 Cir. (1936), 82 F. (2d) 275, the court said:

"* * * Section 4952 of the Revised Statutes, it is true, gave to 'the author of a work the sole liberty of printing, reprinting, publishing * * * and vending the same,' and the act of 1909 has not changed the law [section 1 (a), title 17, U. S. Code, 17 U. S. C. A. sec. 1 (a)], though it did somewhat enlarge the definition. Our reasoning in Hein v. Harris, supra, cannot therefore be confined to musical copyrights, for the same language covers all copyrighted productions; it can be defended only in case copyrights, like patents, are monopolies of the contents of the work, as well as of the right to manifold the work itself. That is contrary to the very foundation of copyright law, and was plainly an inadvertence which we now take this occasion to correct. Baker v. Selden, 101 U. S. 99, 25 L. Ed. 841. Verbally our error arose from not reading the words, 'the same,'

> in Rev. St. Sec. 4952, as referring back to the words, 'the work.' The 'sole liberty of printing, publishing and vending' the 'work' means the liberty to make use of the corporeal object by means of which the author has expressed himself; it does not mean 'the sole liberty' to create other 'works,' even though they are identical. Were it not so the man who first made and copyrighted a photograph under section 5(j) of title 17, U. S. Code, 17 U. S. C. A. sec. 5(j), could prevent every one else from publishing photographs of the same object."

The case just quoted from was approved in *Oxford Book Co. v. College Entrance Book Co.,* 2 Cir. (1938), 98 F. (2d) 688, 691, where it was said:

> "The true concept of what a copyright covers as well as what it does not was given by Judge Learned Hand in Arnstein v. Edward B. Marks Music Corp., supra, when he said, *'The "sole liberty of printing, publishing and vending" the "work" means the liberty to make use of the corporeal object by means of which the author has expressed himself; it does not mean "the sole liberty" to create other "works," even though they are identical'."* (Italics ours.)

The finding must fall also because of the absence of evidence that plaintiff had offered "Movie Crazy" for sale or had offers of purchase.

In *D'Ole v. Kansas City Star,* C. C. W. D. Mo. (1899), 94 Fed. 840, 841, the court said:

> "* * * Furthermore, how could the court, with any degree of required certainty, justifying the assessment of damages against the defendant, determine what damage resulted to the plaintiff from such pub-

lication in this newspaper? The plaintiff did not distribute or attempt to distribute, or sell, a single copy of this pamphlet after the publication in the newspaper, to enable the court by comparison to determine in the remotest degree how the commercial value of his pamphlet was affected by such publication. He could not, without such test or effort, content himself by simply saying that he assumed that his exclusive property in the pamphlet was injured by the newspaper publication, and that it would be useless for him to make the effort to dispose of his pamphlet. Such a method of constituting a basis for the assessment of damages would be too easy for the plaintiff, and would certainly be a very unsafe criterion for the court to recognize in assessing such damages."

The finding must fall also because there is no evidence that any one remembered the magician's coat routine in "Movie Crazy" or would remember the routine in "So's Your Uncle."

In *Fred Fisher v. Dillingham,* D. C. S. D. N. Y. (1924), 298 Fed. 145, 152, the court said:

"The plaintiff may, of course, take the usual injunction, though under the circumstances it will apparently be of no service. As for damages, it seems to me absurd to suggest that it has suffered any injury. 'Dardanella' had faded out before 'Kalua' appeared; but, if it had been at the peak of its popularity, I do not believe that the accompaniment to the chorus of 'Kalua' would have subtracted one copy or one record from its sales. The controversy is 'a trivial pother' (Hough J., dissentiente in Jewelers,' etc. Co. v. Keystone Pub. Co. (C. C. A.), 281 Fed. 83, 95), a mere point of honor, of scarcely more than irritation, involving no substantial interest. Ex-

cept that it raises an interesting point of law, it would be a waste of time for every one concerned.

"However, section 25 (Comp. St. Sec. 9546) fixes a minimum of $250, which is absolute in all cases. Since Westerman Co. v. Dispatch Co., 249 U. S. 100, 39 Sup. Ct. 194, 63 L. Ed. 499, any doubts reserved in Hendricks Co. v. Thomas Pub. Co., 242 Fed. 37, 154 C. C. A. 629 (C. C. A. 2) are laid. Therefore I must and do award that sum as damages. The plaintiff is likewise absolutely entitled to a full bill of costs, but I will make no allowance for counsel fees, since that is discretionary. Such victories I may properly enough make a luxury to the winner."

The finding must fall also because it cannot be ascertained from the record whether the damage, if any, resulted from Universal's photoplay "So's Your Uncle" or from Columbia's picture "Loco Boy Makes Good."

In *Wappenstein v. Schrepel,* (Wash. 1943), 142 Pac. (2d) 897, 899, the court said:

"Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of the fact can with reasonable certainty determine the amount. Where there is evidence as to injuries or loss resulting from various causes, for some of which the defendant cannot be held responsible, but no evidence of the portion of such injuries or loss for which the defendant may be liable, the proof is too uncertain to enable the jury to determine the amount of such injury or loss. (Citing cases.)"

This rule is applied in *Kershaw Mining Co. v. Lankford,* (Ala. 1925), 105 So. 896, an action to recover

damages to a mine; in *Lusk v. Onstott,* (Texas, 1944), 178 S. W. (2d) 549, an action for damages caused to lands by overflow water; and in *Parker v. Pettit,* (Oregon, 1943), 138 Pac. (2d) 592, 596, a malpractice case.

Conclusion.

"'Movie Crazy'" (to borrow the language of McCormick, District Judge, used in 65 F. (2d) 1, 35, with reference to "The Freshman, an earlier Lloyd picture) "is designed as a vehicle to convey to an audience the comical youthful pranks and antics that characterize all the cinema productions of Harold Lloyd."

Harold Lloyd's "slapstick clowning" (*Frankel v. Irwin,* 34 F. (2d) 142, 144) in the magician's coat comedy routine, or for that matter in "Movie Crazy" as a whole, is burlesque, and nothing but burlesque.

Note the definition of burlesque found in *The Columbia Encyclopedia* (1935):

> "burlesque (-lesk') [Ital.,—mockery], a form of entertainment differing from comedy or farce in that it secures its effects from exaggeration, ridicule, mockery, and distortion."

Referring to the year 1909 when motion pictures generally resembled Lloyd's "slapstick clowning"[1] it is said in

---

[1]In *The Film till now. A Survey of the Cinema,* by Paul Rotha, it is said, referring to the period after the advent of Lubitsch as a director: "It was the era of a new type of comedy, not the *slapstick of Lloyd* or the ludicrous style of Keaton, but a suave, polished, slick, slightly-satirical, sexual comedy." (p. 77.) (Italics ours.) It is also said, referring to the work of Chaplin beginning in 1913: "These comedies are usually known as the Keystone period, that being the name of the producing firm. Their character was pure slapstick with the customary ingredients—throwing of custard pies, falling down, hitting people on the head and being hit back." (p. 103).

Metro-Goldwyn-Mayer v. Bijou Theatre Co., D. C. Mass. (1931), 50 F. (2d) 908, 909-910:

> "Nobody then thought of 'drama' or 'dramatic work' in terms of motion pictures."

But, even though the magician's coat comedy routine and "Movie Crazy" as a whole had the protection of dramatic copyright, there is no justification for the finding that the "magician's coat sequence" was copied, or the finding "that the characters, characterization, motivation, treatment, action and sequence of action" of the two comedy routines are the same, when all that was done was to borrow commonplace gags and stage business, with different locale, different actors, different characters, different dialogues, and different costumes, and use the gags and stage business to an entirely different purpose. Particularly it is true, in the face of uncontested evidence that "all comedians do the same gags." [Tr. p. 338.]

How could one who saw the comedy routine in "So's Your Uncle" possibly have deceived himself into believing he was attending "Movie Crazy"?

What of the finding that Bruckman, who had done no more than write the script for the comedy routine in "So's Your Uncle," without any voice whatever in the decision to include the same in the picture, had damaged plaintiff in the selfsame amount as had Universal which produced and distributed and exhibited the same in over 6000 theaters?

And what are we to think of the allegation in plaintiff's verified complaint that "So's Your Uncle" "is largely copied from and based upon plaintiff's said copyrighted motion picture photoplay entitled 'Movie Crazy' "? [p. 4].

And the allegation that Bruckman produced, distributed, and exhibited "So's Your Uncle"?

What of the finding of $40,000.00 damages, without any evidence to support it?

Was not plaintiff's claim for damages, as well as the court's finding, based on guesswork, and nothing but guesswork?

Consider that "Movie Crazy" had netted $400,000.00 thirteen years before, when Lloyd was one of the two or three great personalities in pictures, but had not been shown for ten years and had never been the subject matter of an offer of purchase. And consider the testimony of Lloyd himself that property values in "Movie Crazy" had been damaged $300,000.00 by a Class B picture made with unknown players (except one player cast in a minor role) which was a flop.

Consider, also, Lloyd's testimony on cross-examination:

> "Q. [By Mr. Lewinson] You don't know how many theatres the Columbia picture was shown in, do you? A. All I know is I haven't the slightest idea where any of them ever played in this city. I have never seen one.
>
> Q. When you testified that the re-issue rights of your picture prior to the making of So's Your Uncle were $100,000 and the value of the re-make rights were $200,000, did you take into account the damage that had already been done by the Columbia picture? A. I think, because of the—

Q. Did you take that into account? A. Now, wait a minute. Let me understand just what you are trying to do. I saw that picture only—

The Court: That is not the question. He wants to know whether when you fixed the amount of damages that you claim in this case you took into consideration the fact that your sequence had been used in another picture as well as the one that you are claiming against? A. I would say yes, I had. *I would say that the statement that I made before would stand, anyway.*" [Tr. pp. 156-157.]

What of the liability of Bruckman for invading plaintiff's monopoly of "performing" rights when there is no finding that he had had anything whatever to do with the production, distribution, or exhibition of "So's Your Uncle"?

If we give credit to plaintiff's counsel for the finding "that the characters, characterization, motivation, treatment, action and sequence of action," in the two comedy routines are the same, it may well be said that the many errors of the court below were due to misconceptions of law.

At the opening of the trial the court indicated that it was of the opinion that any borrowing of material whatever from plaintiff's photoplay constituted infringement, even though the material borrowed was not dramatic in character and was not a part of the story of plaintiff's film as a whole. This misconception of the court was a fixed idea

which could not be influenced by argument [Tr. pp. 63, 65, 68, 87, 140, 237-8]. In addition to this misconception, the court also expressed the opinion that where infringement is shown, actual damages result as a matter of course, and the amount of damages is largely guesswork [Tr. pp. 244, 379].

It is plain that plaintiff did not produce evidence showing either liability or damage, particularly as to Bruckman; also, that the finding as to attorney's fees, being ancillary, must fall with the finding as to damages.

It is submitted that the judgment as to Bruckman should be reversed in its entirety with directions to enter a judgment of dismissal.

Respectfully submitted,

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APPENDIX.

I.

Excerpts From Copyright Act of 1909 as Amended in 1912 (1912 Amendments Are in Italics).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* [Section 1] That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, it if be a literary work; to dramatize it if it be a non-dramatic work; to convert it into a novel or other non-dramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

* * * * * * * * *

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

"Sec. 4. That the works for which copyright may be secured under this Act shall include all the writings of an author."

"Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

"(a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations;

"(b) Periodicals, including newspapers;

"(c) Lectures, sermons, addresses (prepared for oral delivery);

"(d) Dramatic or dramatico-musical compositions;

"(e) Musical compositions;

"(f) Maps;

"(g) Works of art; models or designs for works of art;

"(h) Reproductions of a work of art;

"(i) Drawings or plastic works of a scientific or technical character;

"(j) Photographs;

"(k) Prints and pictorial illustrations *including prints or labels used for articles of merchandise;*

"(l) *Motion-picture photoplays;*

"(m) *Motion pictures other than photoplays:*

"Provided, nevertheless, That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act."

"Sec. 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and

such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section twenty-one of this Act."

"Sec. 11. That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or *dramatico-musical* composition; *of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay;* of a photographic print if the work be a photograph; *of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay;* or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale."

"Sec. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(a) To an injunction restraining such infringement;

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, * * *"

II.

Excerpts From Code of Federal Regulations of the Copyright Office, Chapter II, Title 37 as Amended to October 1, 1941.

"201.4—Subject matter of copyright.

* * * * * * * * *

"(b) Section 5 of the Act (35 Stat. 1076; 17 U. S. C. 5) names the thirteen classes of works for which copyright may be secured, as follows:

* * * * * * * * *

"(4) Dramatic and dramatico-musical compositions. Dramatic and dramatico-musical compositions, such as dramas, comedies, operas, operettas, and similar works.

"The designation 'dramatic composition' does not include the following: Dances, motion-picture shows; stage settings or mechanical devices by which dramatic effects are produced, or 'stage business'; animal shows, sleight-of-hand performances, acrobatic or circus tricks of any kind; scenarios for, or descriptions of motion pictures or of settings for the production of motion pictures. * * *

"Dramatico-musical compositions include principally operas, operettas, and musical comedies, or similar productions which are to be acted as well as sung."

* * * * * * * * *

"(12) Motion-picture photoplays. [No text.]

"(13) Motion pictures other than photoplays. [No text.]"

"201.6—Unpublished works. Unpublished works are such as have not at the time of registration been printed or reproduced in copies for sale or been publicly distributed. They include only the works enumerated in section 11 (35 Stat. 1078; 17 U. S. C. 11): Lectures, sermons, addresses, or similar productions for oral delivery; dramatic, musical, and dramatico-musical compositions; photographs; works of art (paintings, drawings, and sculptures); plastic works; motion-picture photoplays; and motion pictures other than photoplays.

"In order to secure copyright in such unpublished works, the following steps are necessary:

* * * * * * * * *

"(b) In the case of unpublished photographs, deposit one copy of the work. (Photo-engravings or photogravures are not photographs within the meaning of this provision.)

* * * * * * * * *

"(d) In the case of motion-picture photoplays, deposit a title and description, with one print taken from each scene or act.

"(e) In the case of motion pictures other than photoplays, deposit a title and description, with not less than

two prints taken from different sections of the complete motion picture.

* * * * * * * * *

"(f) Any work which has been registered under section 11, if published, *i. e.,* reproduced in copies for sale or distribution, must be deposited a second time (accompanied by an application for registration and the statutory fee) in the same manner as is required in the case of works published in the first place. [Rules 19-23.]"

"201.7—Published works * * *

"(b) Definition. Published works are such as are printed or otherwise produced and 'placed on sale, sold, or publicly distributed.' Works intended for sale or general distribution should first be printed with the statutory form of copyright notice inscribed on every copy published or offered for sale in the United States.

"The following works cannot be registered until after they have been published: Books, periodicals, maps, prints and pictorial illustrations. [Rules 24, 25.]"

III.

Background of Act of 1909.

The Copyright Act of 1790 gave protection only to books, maps, and charts. Protection was extended to dramatic compositions in 1856, and to any "photograph or negative thereof" in 1870.

Amdur, *Copyright Law and Practice* (1936), p. 94;
Edison v. Lubin, 3 Cir. (1903) 122 F. 240.

The statutory provision relative to dramatic compositions as it existed at the time of the passage of the Act of 1909 is found in Section 4952 of the Revised Statutes as amended on March 3, 1905.

Pertinent excerpts are as follows:

> "The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph, or negative thereof * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others."

Prior to the 1909 Act, unpublished dramas were not the subject matter of copyright. (See *Ferris v. Frohman* (1912), 223 U. S. 424.)

IV.

Legislative History of Copyright Act of 1909 and the Amendments of 1912.

1. The Revision of 1909.

(a) Preliminary.

With the coming of the twentieth century, the copyright statutes had reached a chaotic state. Passed haphazardly from time to time, their condition was then described by President Roosevelt in his message to Congress in December 1905, as follows:

"Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the Courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public * * * A complete revision of them is essential." (Arguments before Joint Committee on Patents, 1906, p. 3; House Report No. 2222, reporting the 1909 revision to the 60th Congress, 2d Session, p. 1.)

The story of the 1909 revision appears in publications issued by the Government Printing Office in 1906 and 1908, the latter with a complete index, and known as *"Arguments before the Committee on Patents of the House of Representatives conjointly with the Senate Committee on Patents on H. R. 19853, on June 6, 7, 8 and 9, 1906, December 7, 8, 9, 10 and 11, 1906, and March 26, 27, and 28, 1908."* As finally approved by the respective com-

mittees, the revision was reported to the 60th Congress, 2d Session, in House Report No. 2222 and Senate Report No. 1108 (the latter a reprint of the House Report) (p. 20).

(b) The Congressional Committee Hearings of 1908.

White-Smith Music Co. v. Appollo Co. (1908), 209 U. S. 1, was naturally a matter of great concern to the stage managers and producers and proprietors of copyrighted plays. They immediately organized, and when the joint hearings before the Committees on Patents were resumed on March 26, 1908, Mr. Ligon Johnson, an attorney representing the National Association of Theatrical Managers, appeared before the Committee, filed exhibits showing that he represented theatrical interests with an investment of over $200,000,000, and claimed, as a result of the *White-Smith v. Apollo* decision, that the stage interests had no protection against the pirating of their plays in the making of moving pictures (Arguments, March 26, 1908, pp. 23-35). He thereupon recommended that the proposed text of what is now section 1(d), providing for public performance and exhibition of dramatic works, as carried down from the Act of 1856, be revised so as to include the making of an unauthorized motion picture film an infringement of the dramatic work from which it was taken, and, in this connection, suggested the following additional wording: "or to make any transcription or other record whatsoever thereof from which it may be reproduced, performed, or represented if it be a dramatic work." (Arguments, March 26, 1908, p. 24.)

Reading the form of section 1(d) of the 1909 Act will show that this amendment, offered by the theatrical managers in 1908, was accepted and enacted.

(c) Committee Report on 1909 Act.

The following is from the Committee Report (No. 2222):

"Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word 'copy,' practically adopts the phraseology of the first copyright act Congress ever passed—that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts.

"Paragraph (b) in the section contains certain new legislative features, but is consistent with the existing law as construed by the courts.[1]

"Paragraph (c) is new, but is believed to be a wise provision, and it needs no explanation.

"There has been a good deal of discussion regarding subsection (d) of section 1. This section is intended to give adequate protection to the proprietor of a dramatic work. It is usual for the author of a dramatic work to refrain from reproducing copies of the work for sale.

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[1]But see, 18 C. J. S., p. 226; Chafee, "Reflections on the Law of Copyrights," 45 *Columbia Law Review,* pp. 511-512.

He does not usually publish his work in the ordinary acceptation of the term, and hence in such cases never receives any royalty on copies sold. His compensation comes solely from public representation of the work. It has sometimes happened that upon the first production of a dramatic work a stenographer would be present and would take all the works down and would then turn the manuscript over to some one who had hired him to do the work or sell it to outside parties. This manuscript would then be duplicated and sold to persons who, without any authority whatever from the author, would give public performances of the work. It needs no argument to demonstrate how great the injustice of such a proceeding is, for under it the author's rights are necessarily greatly impaired. If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law. We have endeavored to so frame this paragraph as to amply secure him these rights."

"Section 11 refers to copyright on works on which copies are not reproduced for sale, and deals with what shall be deposited as copies. It provides, however, that if the work is later reproduced in copies for sale, the copies themselves must be deposited. If the work be a photograph, the proprietor need not file a copy of the photograph, but merely a photographic print. If it be a work of art or a plastic work, he need not file a copy of that, but simply a photograph or an identifying reproduction thereof."

2. Amendments of 1912.

(1) Preliminary.

Alarmed by the doctrine laid down in *Kalem Co. v. Harper Bros.*, 222 U. S. 55, which was affirmed by the Supreme Court in 1911 (the decision of the Circuit Court of Appeals had been handed down in 1908), the producers of motion pictures saw themselves faced with the possibility of enormous damages for *exhibiting,* or rather, *contributing to the infringing exhibitions by the exhibitors* operating thousands of theatres in the United States, if perchance the photoplay produced and distributed by them infringed upon a copyrighted novel or drama. (Hearings June 24, 1912, pp. 8-9.)

(2) Committee Hearings on 1912 Amendments.

The representatives of the motion picture producers urged amendments to Section 25 of the Act of 1909 to limit damages for innocent infringement. (See Hearings, January 24, 1912, pp. 8, 9, 28.)

Pursuant to some purely administrative suggestions contained in some other bills and approved by the Register of Copyrights at the conclusion of the hearings (April 3, 1912, pp. 106-108), there was adopted in the final draft of the Townsend bill an amendment to section 5, adding a *"Class L"* and a *"Class M"* for respective motion picture photoplay and nonphotoplay registrations, and an amendment to section 11, making further administrative provisions with respect to registration of motion pictures. This amendment to section 5 did not thereby for the first time create, establish or secure the right of copyright for motion pictures. The Register of Copyrights, Mr.

Thorvald Solberg, in a report to the Librarian of Congress dated April 2, 1912, which he introduced for the record of the Committee hearing on April 3, 1912, (pp. 106-108), stated that:

"*Copyright of Motion Pictures.*—Motion pictures are now registered for copyright under the Act of Mar. 4, 1909 as 'photographs'." (p. 108).

(3) Report of the Committee on 1912 Amendments.

The Report of the Committee deals with sections 5, 11, and 25.

The following is from the Report of the Committee (No. 756) on sections 5 and 11:

"Section 5 of said act provides that the application for registration shall specify to which of the classes named therein the work in which copyright is claimed belongs. The section as proposed in H. R. 24224 is an exact reenactment of the original section, with two classes of works added thereto, as follows:

"(l) Motion-Picture photoplays.

"(m) Motion pictures other than photoplays.

"The occasion for this proposed amendment is the fact that the production of motion-picture photoplays and motion pictures other than photoplays has become a business of vast proportions. The money invested therein is so great and the property rights so valuable that the committee is of the opinion that the copyright law ought to be so amended as to give to them distinct and definite recognition and protection. This it seeks to do, so far as

section 5 is concerned, by adding the two new classes above set forth.

"Section 11 of the copyright act provides for copyright of works, 'of which copies are not reproduced for sale.'

"Section 11 as amended in H. R. 24224 is an exact re-enactment of section 11 of the present law, with the additional language as hereinafter indicated. [The additions are indicated. They are shown in italics, Brief, p. 3.]

"This language is necessary to enlarge section 11 so as to provide for the two new classes added to section 5, as above referred to. It serves no other purpose and is intended to have no other effect."

(4) The Debate in Congress on June 17, 1912.

The bill was called up for debate "by unanimous consent" on June 17, 1912, after the Committee had recommended its passage in House Report No. 756. The entire debate on the bill took place that day, and appears on but five pages of the Congressional Record (Cong. Rec., House 62d Cong. 2d Sess. pp. 8288-8292). It relates entirely to the interpretation of Section 25.